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WASHINGTON REPORTS
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CASES DETERMINED
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SUPREME COURT
OF
WASHINGTON

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JUDGES
OF THE
SUPREME COURT OF WASHINGTON
DURING THE PERIOD COVERED IN THIS VOLUME

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JUDGES

OF THE

SUPERIOR COURTS OF WASHINGTON

During the Pendency Therein of the Cases Reported in this Volume.

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Kitsap and Snohomish . . .	Hon. JOHN C. DENNEY.
Whatcom	Hon. JEREMIAH NETERER.

* Term expired January, 1903.

† Term commenced January, 1903.

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CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 4429. Decided September 19, 1903.]

SARAH WOODWARD *et al.*, Appellants, v. H. C. TAYLOR
et al., Respondents.¹

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38	13
38	606
33	1
40	258

TAXATION—ASSESSMENT LIST—OMISSION OF OWNER'S NAME—NOTICE. The assessment of real property to the wrong person and the omission of the name of the owner does not invalidate a tax under the revenue laws of 1890, 1893, 1895 and 1897, providing that realty shall be listed "with the name of the owner if known, and if unknown, so stated," where it does not appear that the true owner was known to the taxing officers, since such provision is directory only and not essential to the proceeding *in rem* by which the tax is enforced.

SAME—PROCEEDING *in Rem*. There was no substantial change in the method of assessment and collection provided by the revenue laws of said years, which was by a proceeding *in rem*, in which the assessment itself is due notice to the owner of the realty of the tax charged.

TAX SALE—REDEMPTION—NOTICE TO OWNER—SUFFICIENCY. Notice to a nonresident owner of the expiration of the period of redemption and application for a tax deed, by service upon a resident agent, and upon the tenants in possession, and by publication, is all that is required by Laws 1893, p. 380, § 127, although the assessment was made to the wrong person.

TAXATION—STATUTES—REPEAL. The revenue law of 1891 did not supersede the law of 1890 so as to render the latter inoperative before any assessment could be made thereunder, when proceedings were begun under the act of 1890 before the law of 1891

¹Reported in 73 Pac. 785, 75 Pac. 646.

went into effect, since the repealing clause repressly excepted from its operation all pending proceedings and existing rights.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 4, 1902, upon motion of the defendants at the close of the plaintiffs' case, at a trial before the court without a jury, dismissing an action to quiet title and recover possession of premises sold for taxes. Affirmed.

T. O. Abbott and Preston, Carr & Gilman, for appellants, contended, *inter alia*, that the name of the owner was a prerequisite to a valid assessment. *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *Vestal v. Morris*, 11 Wash. 451, 39 Pac. 960; *Coolidge v. Pierce County*, 28 Wash. 95, 68 Pac. 391; *Northern Pac. R. Co. v. Galvin*, 85 Fed. 811; *State Trust Co. v. Chehalis County*, 79 Fed. 282. The notice of the expiration of the period of redemption and application for a tax deed was insufficient because not addressed to the owners. *Slyfield v. Barnum*, 71 Iowa 245, 32 N. W. 270; *Black, Tax Titles*, §§ 338, 339, 385; *Blackwell, Tax Titles*, §§ 681, 682 (5th ed.); *Wilson v. Russell*, 73 Iowa 395, 35 N. W. 492; *Price v. England*, 109 Ill. 394; *Denike v. Rourke*, 3 Biss. 39, Fed. Cas. No. 3787. The affidavit of service of said notice did not show a service of notice to the owners, and this invalidates the sale. *Herrick v. Niesz*, 16 Wash. 74, 47 Pac. 414; *Coulter v. Stafford*, 46 Fed. 564.

Richard Saxe Jones, for respondents.

MOUNT, J.—This action is to quiet title to certain real estate. Several causes of action are alleged in the complaint. Each cause is to set aside a separate deed to the property in question. It is necessary to notice only the first cause alleged. For some time prior to the year 1891, Sarah Woodward was a nonresident of the state of Wash-

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Opinion Per MOUNT, J.

ington, and is still such nonresident. She was the owner of lot 8, in block 11, Maynard's Plat to the City of Seattle. This property was assessed for general, state, and county taxes for the year 1891 in the name of C. Winehill. It does not appear that the taxing officers knew, when the assessment was made, that the property belonged to Mrs. Woodward. Subsequently the taxes for that year became delinquent, and the property was sold in 1894, under the provisions of the revenue act of 1893 (Laws 1893, p. 323, ch. 124). The county of King became the purchaser. Subsequently the county transferred the certificate of sale to the respondents, who thereafter obtained a tax deed. At the trial of the cause the lower court held that this tax deed conveyed a valid title, and dismissed the action. The points relied upon by appellants to secure a reversal are that the property was not assessed in the name of the owner, that no notice of the sale, or of the expiration of the time of redemption, or of the application for a deed, was given to the owner, and that, therefore, the respondents acquired no title to the land by virtue of the sale and tax deed.

In *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, this court held that, under the revenue law of 1871 (Laws 1871, p. 36), the assessment of unoccupied land to one not its owner was unauthorized and void. In *Vestal v. Morris*, 11 Wash. 451, 39 Pac. 960, this court held that, under the law in force in 1886, the failure to assess real property in the name of a known owner was a substantial failure to comply with the law, and that the assessment was void. At the time of the assessment in each of the foregoing cases, the law then in force was substantially as found in the Code of 1881, § 2832 of which provides:

"The assessor shall set down in an assessment roll, to be prepared by himself, in separate columns and accord-

ing to the best information he can obtain: (1) The names alphabetically arranged of all persons subject to taxation in his county, and numbers of the road and school districts of which each person assessed is a resident. (2) A description of each tract or parcel of land to be taxed, specifying under separate heads the township, range, and section, and the number of the school and road district in which the land lies, or if divided into lots and blocks, the number of the lot and block. (3) The number of acres and parts of an acre, as near as the same can be ascertained, unless the land be divided into lots and blocks. (4) The number of acres and parts of acres in each parcel of land, except town or city lots, that are improved or cultivated. (5) The full cash value of the improvements upon each lot or parcel of land assessed. (6) The full cash value of each lot or parcel of land assessed. (7) The full cash value of all the taxable personal property owned by, or to be taxed against, such persons, as provided by law. (8) The total valuation of all property assessed, real and personal. (9) The amount of road poll tax of each person or firm liable for the same. (10) The amount of poll tax of each person or firm liable for the same."

"§ 2836: If the owner or claimant of any property, not listed by another person, is absent or unknown, the assessor must list and make an estimate of the value of such property."

"§ 2837: If the name of the absent owner is known to the assessor, the property must be assessed in his name; if unknown the property must be assessed to 'unknown owners.'"

After delinquency, taxes were collected by distraint and sale of personal property belonging to the person assessed. In the year 1890 the legislature passed an independent revenue law for the assessment and collection of taxes, and repealed all prior laws. Laws 1889-90, p. 530, ch. 18. By § 49 of this act (page 548) it was provided:

"The assessor shall make out, in the real property assessment book, in numerical order, complete lists of all

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lands or lots subject to taxation, showing the names of the owners, if to him known, so stated opposite each tract or lot, the number of acres, and the lots or parts of lots, or blocks, included in each description of property."

For the assessment of personal property, the assessor was required by § 53, p. 549, to make an alphabetical list of the names of the persons in his county liable to assessment of personal property, and to require each person to make a correct statement of such property. This act provided for the levy of the taxes for state and other purposes, and that, when such taxes should become delinquent, if not paid at a certain time after delinquency, the county auditor should file in the office of the clerk of the superior court of the county a list of the delinquent taxes upon real estate within his county, "which list shall contain a description of each piece or parcel of land on which such taxes shall be so delinquent, with the name of the owner, if known, and if unknown, so stated, appearing on the delinquent list, and the amount of tax delinquent and penalty for each year opposite such description, and shall verify such list by his affidavit that the same is a correct list of the taxes delinquent for the year or years therein appearing, upon real estate in said county. The filing of such list shall have the force and effect of filing a complaint in an action by the county against such piece or parcel of land therein described, to enforce payment of the taxes and penalties therein appearing against it, and shall be deemed the institution of such action." § 100, p. 566. The act (§ 101) then provides that the clerk of the court shall publish a notice directed "to all persons, companies or corporations who have or claim to have any estate, right, or interest in, claim to, or lien upon, any of the several pieces or parcels of land in the list hereto attached," requiring them to appear and set forth any objection or defenses to the

taxes; and, after publication of the notice, that the superior court should be deemed to have acquired jurisdiction to enforce against the land the taxes, penalties, and costs by a proper judgment to that effect. It also provided for trial in case of any appearance, and that no omission of the assessing or levying officer shall be a defense to the taxes unless the land shall have been partially, unfairly, or unequally assessed, or that the taxes have been paid or the land exempt from taxation. It provided further that the judgment should be final except as to persons who had appeared in the action. It will be readily observed that this act, in so far as it affected real estate, was an assessment *in rem*, and the taxes were enforced against the land, and not against the person, as was the law prior to the act of 1890.

In the year 1893 the legislature passed another independent revenue act for the assessment and collection of taxes, and repealed all former acts. The general plan of this act as to the assessment and collection of taxes was the same as that of the act of 1890 (Laws 1889-90, p. 530, ch. 18). § 45 of the act of 1893 (Laws 1893, p. 341) is as follows:

"The assessor shall list all real property according to the smallest legal subdivision, as near as practicable, and, where land has been platted into lots and blocks, he shall list each lot or fraction thereof separately. The assessor shall make out in the real property assessment books, in numerical order, complete lists of all lands or lots subject to taxation, showing the names of owners if to him known, and if unknown, so stated, opposite each tract or lot in pencil memorandum, the number of acres, and lots or parts of lots, included in each description of property."

Section 48 provides for an alphabetical list of individuals liable to assessment for personal property, as was provided in § 53 of the act of 1890. The manner of en-

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forcing the collection of delinquent taxes on real estate under the act of 1893 was substantially the same as under the act of 1890. In the year 1895 several sections of the act of 1893 were amended. Section 45 was amended to read as follows (Laws 1895, p. 512):

"The assessor shall list all real property according to the smallest legal subdivision, as near as practicable, and where land has been platted into lots and blocks, he shall list each lot or fraction thereof separately: Provided, That when several lots in any block, or several blocks in any plat of any addition, subdivision, or townsite, or several tracts of land shall be owned by any one person, firm, syndicate, or corporation, the assessor may group such lots or blocks and tracts so far as practicable. The assessor shall make out in the real property assessment book, in numerical order, complete lists of all lands or lots subject to taxation, showing the names of owners, if to him known, and if unknown, so stated, opposite each tract or lot in pencil memorandum, the number of acres and lots or parts of lots included in each description of property"

It will thus be seen that there has been no material change since the act of 1890 in the manner of listing, assessing, or collecting taxes on real property in this state. The essential provision for listing and assessing real estate has been maintained in the acts of 1893 and 1895 substantially as it was in 1890, viz.:

"The assessor shall make out, in the real property assessment book, in numerical order, complete lists of all lands or lots subject to taxation, showing the names of the owners, if to him known, and if unknown, so stated, opposite each tract or lot in pencil memorandum, the number of acres and lots or parts of lots included in each description of property."

In the case of *Coolidge v. Pierce County*, 28 Wash 95, 68 Pac. 391, this court held that the omission of the name of the owner and of the entry of unknown owner, under

the curative provisions of the act of 1893 (Laws 1893, p. 323, ch. 124), did not invalidate an assessment for the year 1897 and previous years. It was there said:

"In the tax levied in 1897 upon realty belonging to plaintiff, under the law of 1895 (Laws 1895, pp. 511, 512, §§ 3, 4), the tax is charged upon the land, and the proceedings are *in rem*. It was therefore competent for the legislature to provide, as it did, that the land should be assessed by suitable description, in numerical order, at a certain time, and the assessment roll made up and filed at a certain time, and such proceedings may be due notice to the owner of such realty of the tax charged."

But it was also said in that case:

"Counsel for plaintiff urges that the failure to enter the name of the owner or of unknown owner after the description of the realty is a substantial defect, and to the injury of the plaintiff. This was true under the revenue law prior to the enactment of the statute of 1895. Under the prior system, real property was assessed to the owner. The owner's name was an essential part of the description. It was in fact a material part of the notice given to him of the tax charged against his real property, and was so adjudged by this court. *Baer v. Choir*, 7 Wash. 631, 32 Pac. 776, 36 Pac. 286; *Vestal v. Morris*, 11 Wash. 451, 39 Pac. 960. And see *Railroad Co. v. Galvin*, 85 Fed. 811."

It is argued by appellants that this language is decisive of this case, and it is, in effect, a decision of this court that, prior to the act of 1895, the name of the owner was a necessary requisite to a valid assessment. At that time we were not considering the effect of any act prior to the act of 1895, and the court assumed without an examination that the prior acts were substantially the same as when the decisions cited were rendered. It was not necessary in that case to decide what the effect of other acts was. As we have seen above, there was no material dif-

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ference in the manner of listing, assessing, and collecting taxes upon real estate, between the act of 1890 and that of 1895. If the assessment and proceedings to collect taxes were *in rem* in 1895, as was held in *Coolidge v. Pierce County*, they were also *in rem* in 1890. The cases of *Baer v. Choir* and *Vestal v. Morris* were based upon the laws providing for assessment of real property to the owner and collection by distraint of personal property. Since the act of 1895 provided for assessment and collection *in rem*, those cases could have no application to the act of 1895, and this was the distinction which the court made. The United States circuit court in *Northern Pac. R. Co. v. Galvin*, 85 Fed. 811, held that under the statute in force in this state in 1891 (which was the act of 1890), the name of the owner was necessary to a valid assessment of real estate, because it was an essential part of the notice of the initiation of proceedings to create a tax lien. The learned judge in that case assumed that the assessment was against the person, and that the name of the owner was necessary to a valid assessment by reason of the two decisions from this court above referred to. Those decisions, as we have already stated, were not based upon the act of 1890, but were based upon the law in force long prior thereto, which provided for assessments to the person of the owner. If the decision in *Coolidge v. Pierce County* was right—and we still think it was—in holding that the name of the owner is not necessary to a valid assessment *in rem*, then *Northern Pac. R. Co. v. Galvin* was wrong upon that point. In *Coolidge v. Pierce County* we held that, “the provision for the memorandum of the name of the owner or unknown owner may be considered directory to the officer; . . . and the omission to mention the name of the owner, or to assess to an unknown owner,” was not of the substance of the assessment of the property

under the act of 1895. If it was not of the substance of the act of 1895, it was not of the substance of the act of 1890, and therefore its omission from the assessment of appellants' property in the year 1891 did not invalidate the assessment. The assessment, being valid, was itself notice to the owner of the realty of the tax charged. *Coolidge v. Pierce County, supra*. And when the notice was given, as required by law, to all persons having or claiming any interest in the land to appear and object to and defend against the taxes, and all proceedings were regular, the court acquired jurisdiction of the *res*, and was, therefore, authorized to order a sale of the property. *Cooley, Taxation* (2d ed.), p. 527; *Black, Tax Titles*, §§ 168, 170.

It is next urged that there was no notice to the owners of the expiration of the period of redemption and of the application for a deed. This point is based largely upon the point already considered. It is shown by the record that notice, as required by law, was given to all the tenants and occupants of the property and the person in whose name it was assessed, that the owner, Mrs. Woodward, was a nonresident of the state, and that a notice was given to her agent in Seattle, and was also published. This was all that was required by § 127 of the Laws of 1893, p. 380. Holding as we do upon the points above discussed, it is unnecessary to refer to or discuss other errors alleged in the briefs.

The judgment of the lower court is therefore affirmed.

FULLERTON, C. J., and ANDERS and DUNBAR, JJ., concur.

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Citations of Counsel.

ON PETITION FOR REHEARING.

[Decided February 23, 1904.]

T. O. Abbott and Preston, Carr & Gilman, for appellants, contended, among other things, that an error in the name in the notice of sale vitiates the sale whether the proceeding is *in rem* or *in personam*. *Taussig v. Glenn*, 51 Fed. 409; *Troyer v. Wood*, 96 Mo. 478, 10 S. W. 42, 9 Am. St. 367; *Chamberlain v. Blodgett*, 96 Mo. 482, 10 S. W. 44; *Emeric v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Lewis v. Blackburn*, 42 Ore. 114. This statute was adopted from Illinois where it is held that the provisions must be strictly complied with. *Davis v. Gosnell*, 113 Ill. 121; *Price v. England*, 109 Ill. 395; *Gage v. Hervey*, 111 Ill. 305; *Gage v. Mayer*, 117 Ill. 632, 7 N. E. 97; *Stillwell v. Brammell*, 124 Ill. 338, 16 N. E. 226; *Gage v. Stewart*, 127 Ill. 207, 19 N. E. 702, 11 Am. St. 116; *Combs v. Goff*, 127 Ill. 431, 20 N. E. 9. A difference in the name in the affidavit and in the assessment is fatal. *Gage v. Mayer, supra*; *Gonzalia v. Bartelsman*, 143 Ill. 634, 32 N. W. 532. Notice addressed to the wrong person is held fatal. *Lynn v. Morse*, 76 Iowa 665, 39 N. W. 203. If it appears that the real owner has not been served, the sale is void. *Smith v. Prall*, 133 Ill. 308, 24 N. E. 521; *Stillwell v. Brammell, supra*; *Harding v. Brophy*, 133 Ill. 39, 24 N. E. 558; *Smyth v. Neff*, 123 Ill. 310, 17 N. E. 702. Service upon an agent is not a good notice. *Gage v. Waterman*, 121 Ill. 115, 13 N. E. 543. These rules are supported by authorities elsewhere. *Cool-ey, Taxation*, pp. 532, 536 (2d ed.); *Black, Tax Titles*, 348, 350 (2d ed.); *Kessey v. Connell*, 68 Iowa 430, 27 N. W. 365; *Weaton v. Knight* (Iowa), 16 N. W. 532; *Arthur v. Smathers*, 38 Pa. St. 40; *Doughty v. Hope*, 3 Denio 594; *Dentler v. State*, 4 Blackf. 258; *Hartley v.*

Boynnton, 17 Fed. 873; *Walsh v. Burke*, 134 Cal. 594, 66 Pac. 866; *Miller v. Williams*, 135 Cal. 183, 67 Pac. 788.

Richard Saxe Jones, for respondents, contended, among other things, that the name of the owner is not essential in a proceeding *in rem*. *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 342; Black, Tax Titles, § 110 (2d. ed.). The strict construction in Illinois has been modified. *Hammond v. Carter*, 155 Ill. 579, 40 N. E. 1019. And does not apply here, where the rule is that a judgment in a tax case cannot be collaterally attacked for irregularity. *Kizer v. Caufield*, 17 Wash. 417, 49 Pac. 1064; *Eitel v. Foote*, 39 Cal. 439. This law is liberally construed in Iowa, where the decisions uphold the judgment in the case at bar. *Trulock v. Bentley*, 67 Iowa 602, 25 N. W. 824; *Irwin v. Burdick*, 79 Iowa 69, 44 N. W. 375; *Stull v. Moore*, 70 Iowa 149, 30 N. W. 387; *Hillyer v. Farne-man*, 65 Iowa 227, 21 N. W. 578; *Rice v. Haddock*, 70 Iowa 318, 30 N. W. 579; *Johnson v. Brown*, 71 Iowa 609, 33 N. W. 127; *Baker v. Crabb*, 73 Iowa 412, 35 N. W. 484; *Bolin v. Francis*, 72 Iowa 619, 34 N. W. 447.

PER CURIAM.—On petition for rehearing our attention is called to the fact that nothing was said in the opinion about the act of 1891, Laws 1891, p. 280, and it is now insisted that the act of 1890 never became operative for the following reasons: Because it became a law on March 28, 1890, without the approval of the governor; it contained no emergency clause, and therefore did not become effective until June 28, 1890; by its terms the assessment books were to be delivered to the assessor on the last Saturday in March, and that officer was to begin his duties in April, which was two months prior to the time the act became effective; on March 9, 1891, another revenue act was

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passed, which became effective at once. It is insisted that the act of 1891 repealed and superseded the act of 1890, that the latter act never became operative, that the assessment for the year 1891 was therefore made under the act of 1891, and that, under § 45 thereof, the system of numerical assessment or assessments *in rem* did not apply for that year. This theory of the case was not presented to the court below, and was not mentioned in the arguments or briefs on the appeal, but the case was presented both in the lower court and in this court upon the theory that the assessment was made under the act of 1890, as in fact it was, and the act of 1891 was for that reason not mentioned.

If the act of 1890 was superseded by the act of 1891, as stated, there would be much force in appellant's position, but in the repealing clause of the act of 1891 it was expressly provided (Laws, 1891, p. 325, § 119):

"That the repeal of said act [1889-90] shall not be construed to impair any existing right, or affect any proceeding pending at the time this act shall take effect; but all proceedings for the assessment of any tax or collection of any tax, or special assessment remaining incomplete, may be completed under the provisions of the above entitled act hereby repealed."

Proceedings for the assessment in King county were begun in 1891 under the act of 1890, before the passage of the act of 1891. These proceedings were completed under the saving provision above set out. It follows, therefore, that the provisions of the act of 1891 did not affect the validity or method of the assessment under the act of 1890.

Other questions presented in the petition for rehearing do not require further discussion. We are satisfied with the conclusion reached in the original opinion. The petition for rehearing is therefore denied.

[No. 4550. Decided September 21, 1903.]

CLARENCE D. HILLMAN, *Appellant*, v. CITY OF SEATTLE,
Respondent.¹

INJUNCTION—RESTRAINING ENFORCEMENT OF PENAL ORDINANCE. Injunction against the enforcement of a penal ordinance not a police regulation, which affects valuable property rights, may be maintained where otherwise resort to the criminal courts would be required to test the validity of the law.

MUNICIPAL CORPORATIONS—ORDINANCES—REGULATION OF PLATTING ADDITIONS TO CITY—VALIDITY. The fact that a section of a municipal ordinance regulating the filing of plats of additions affects lands outside the city does not invalidate the remainder as to lands within the city.

SAME—DISCRETION OF CITY COUNCIL—ULTRA VIRES. The Seattle municipal code of 1892, §§ 747-750, requiring plats of city additions to be approved by the city council if, upon report by the city engineer, the streets are found to coincide with other streets in the city, vests discretionary powers in the council, and does not absolutely require that they shall so coincide, and injunction will not lie to restrain the enforcement of the ordinance as ultra vires, or because the council may abuse its discretion, unless compliance is made impossible or unreasonable by the council's construction thereof.

SAME—REGULATIONS AS TO PAYMENT OF TAXES. An ordinance making the payment of city taxes a prerequisite to the filing of any plat as an addition to the city is not an unreasonable regulation.

SAME—COMPLAINT—SUFFICIENCY. A complaint to enjoin the enforcement of an ordinance regulating the filing of plats of additions to the city is insufficient when it fails to allege the necessary preliminary steps for approval of a plat, since it may be finally approved by the council.

SAME—TITLE OF ORDINANCE. The objection that the title of an ordinance is not broad enough to include the penalty, will not be considered in a suit to enjoin its enforcement, when it does not affect other portions of the act.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 6, 1902, upon sus-

¹Reported in 73 Pac. 791.

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taining a demurrer to the complaint, dismissing an action to enjoin the enforcement of a municipal ordinance regulating the platting of additions to the city. Affirmed.

Frederick R. Burch, for appellant. The validity of the ordinance may be attacked in a proceeding for an injunction by any party whose interests are injuriously affected. *Deems v. Mayor of Baltimore*, 80 Md. 164, 30 Atl. 648, 45 Am. St. 339, 26 L. R. A. 541; *Page v. Mayor of Baltimore*, 34 Md. 558; *Holland v. Mayor of Baltimore*, 11 Md. 186, 69 Am. Dec. 195; *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 4 South. 106, 5 Am. St. 342; *Wood v. Brooklyn*, 14 Barb. 425; *Austin v. Austin City Cemetery Ass'n*, 27 Tex. 330, 27 S. W. 528, 47 Am. St. 114; *Atlanta v. Gates City Gas Light Co.*, 71 Ga. 106; *Platte etc. Milling Co. v. Lee*, 2 Colo. App. 184, 29 Pac. 1036. The city must act within a power clearly and expressly conferred. *Tacoma Gas etc. Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655. It is impossible to literally comply with the ordinance and it is invalid as arbitrary or oppressive. *Dillon, Munic. Corp.* (4th ed.) §§ 55, 319-20, 328; *Wygant v. McLauchlan*, 39 Ore. 429, 64 Pac. 867, 87 Am. St. 673, 54 L. R. A. 636; *St. Paul v. Laidler*, 2 Minn. 190, 72 Am. Dec. 89; *Kip v. Mayor etc. of Patterson*, 26 N. J. L. 298; *Phillips v. Denver*, 19 Colo. 179, 34 Pac. 902, 41 Am. St. 230. The ordinance should be so definite and certain as to leave no reasonable doubt of its scope and application. *McConville v. Mayor etc. of Jersey City*, 39 N. J. L. 38; *State v. Clark*, 69 Conn. 371, 37 Atl. 975, 61 Am. St. 45, 39 L. R. A. 670; *San Francisco Pioneer etc. Factory v. Brichwedel*, 60 Cal. 166. It is invalid as in contravention of common right and in restraint or prohibition of trade. *Los An-*

geles County v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 Pac. 153, 71 Am. St. 75; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *St. Paul v. Laidler*, *supra*; *Ex parte Sing Lee*, 96 Cal. 354, 31 Pac. 245, 31 Am. St. 218, 24 L. R. A. 195; *Dillon, Munic. Corp.* §§ 319, 321n, 323-6, 390, 398.

Mitchell Gilliam and William Parmerlee, for respondent. Injunction is not the proper remedy to test the validity of penal ordinances. *Kansas City Cable Co. v. Kansas City*, 29 Mo. App. 89; *Holderstaffe v. Saunders*, 6 Mod. 16; *Davis v. American Society etc.* 75 N. Y. 362; *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482; *Hemsley v. Myers*, 45 Fed. 283; *Davis etc. Mfg. Co. v. Los Angeles*, 115 Fed. 537; *Denver v. Beede*, 25 Colo. 172, 54 Pac. 624; *Golden v. Guthrie*, 3 Okl. 128, 41 Pac. 350; *Ewing v. Webster City*, 103 Iowa 226, 72 N. W. 511; *Poyer v. Village of Desplaines*, 123 Ill. 111, 13 N. E. 819, 5 Am. St. 494; *Paulk v. Sycamore*, (Ga.) 47 Cent. L. J. 253. The ordinance is a reasonable and valid police regulation. *Gundling v. Chicago*, 176 Ill. 340, 52 N. E. 44; *S. C.*, 177 U. S. 193, 20 Sup. Ct. 633.

PER CURIAM.—Plaintiff was the owner of certain lands within the city limits of the city of Seattle, and was engaged in the business of platting and recording and selling lots therein. The complaint alleges that he platted certain of said lands into lots and blocks, and presented said plat to the city council for its approval, and that the city council, acting under the authority of ordinance No. 2593, entitled "An ordinance to regulate the manner and form of making and approving and filing plats of additions or subdivisions of land within the city, and plats of additions to the city of Seattle within and without the city," refused to approve the same, for the alleged reason

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that the conditions precedent, as provided in said ordinance, had not been complied with; and the city threatened to prosecute said plaintiff if he filed said plat with the county auditor without its said approval. Plaintiff brought this action to enjoin the enforcement of said ordinance against him, on the ground that the same was *ultra vires*, void, and inoperative, and that its enforcement would seriously damage him in his said business. A demurrer to the complaint or petition was sustained, and the action dismissed. Plaintiff appeals.

Respondent maintains strenuously that injunction will not lie to prevent the enforcement of a penal ordinance, and, as a general rule, this is admitted to be true, especially with regard to the enforcement of strictly police regulations; but it is insisted by appellant that this is not a police regulation, notwithstanding a penalty is fixed for each violation thereof. The great difficulty of passing upon the constitutionality of an ordinance or statute in a proceeding to prevent its enforcement is that it compels the court and council to anticipate in a great measure its possible effects on individual rights and constitutional safeguards, and decisions under such circumstances could hardly be taken as reliable precedents for future cases. It seems to us, however, that a person who has valuable property rights at stake ought not to be required or expected to submit to the odium of being dragged into a criminal court before being permitted to take steps to protect these rights. But the court will not, in an action of this kind, pass upon any more of said ordinance than is squarely before it and absolutely necessary to a decision of the case. The parts of the ordinance complained of are §§ 747, 748, 749 and 750 of the Municipal Code of 1902, and are as follows:

"§ 747. Before any plat of any addition or subdivision of any land within the limits of the city of Seattle, or any plat purporting to embrace an addition to the city of Seattle, whether covering lands within or without the city limits, shall be filed for record in the office of the Auditor of King county, such plat shall be first submitted by the person or persons making the same to the city council for approval.

"§ 748. When any such plat is so submitted to the City Council the same shall be referred to the City Engineer and thereupon it shall be the duty of the City Engineer to examine the same and to make such actual surveys of the land described in the plat as will enable him to certify to its correctness and to report to the City Council the matters specified in this section. The City Engineer shall report to the City Council whether the streets and alleys marked on such plat are of proper width and coincide with other streets and alleys, or extensions of the same, abutting on the land so platted, and whether the same is in accordance with the requirements of this ordinance. If the City Engineer finds that such plat complies with the requirements of this ordinance, he shall certify his approval thereon in writing. Before examining any such plat or making surveys thereof, the City Engineer shall estimate the cost of such surveys, and the person or persons making such plat shall thereupon deposit with the City Treasurer the amount of such estimate, which shall be retained by the City Treasurer as a special deposit, and after such surveys have been completed the City Engineer shall certify to the City Treasurer the actual cost thereof. If the sum deposited exceeds the actual cost, the surplus shall be returned to the person or persons paying the same, and if such deposit is less than the actual cost, the person or persons making the plat shall pay to the City Treasurer such deficiency before the plat is approved.

"§ 749. Every such plat shall be properly executed and acknowledged by the owners of the land covered thereby in the manner prescribed by the laws of the state.

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Each plat shall state the course of the lot, block and street lines shown thereon with reference to the city standard meridian, as fixed by ordinance, so that such lines can be accurately located. No plat shall be approved of any addition or subdivision the land forming which or any part of which is subject to lien for any city tax or assessment of any nature.

"§ 750. When such plat so submitted, as herein provided, is reported back to the City Council by the City Engineer and is found to be in conformity with the general plan of the city, and it is found that the streets and alleys thereon marked are of proper width and coincide with other streets and alleys or extensions of the same abutting on the land so platted, and that such plat in all respects complies with the requirements of this ordinance and is otherwise correct and proper and satisfactory to the City Council, the City Council shall by ordinance approve such plat."

The first section above quoted is attacked upon the ground that it attempts to legislate upon the status of lands lying without the limits of said city, but, as there seems to be no controversy involving lands lying without the city limits, to hold that section void would not avail appellant anything, and would not render invalid the remainder of the ordinance.

The second section is complained of because, as alleged in the complaint, "it makes it incumbent upon a party desiring to plat a piece of ground either within or without the city limits to make the streets and alleys marked on such plat of proper width and coincide with other streets and alleys or extensions of the same abutting on the lands so platted."

Literally the section does not so read, and could, in any event, only be held to require that the streets and alleys should coincide with other streets and alleys abutting on the same as near as may be. The section does not re-

quire absolutely that the streets and alleys shall coincide with other streets and alleys in either location or width, but provides that the city engineer shall report as to whether they do or not. It is not unreasonable to hold that it was the purpose of the section to require the engineer to examine a plat and make such survey and measurements as might be necessary to determine whether the streets and alleys were of the width and courses, and the lots and blocks of the size, that they purported upon the plat to be; and, until the city authorities put a construction upon the section with which compliance would be impossible, or which is unreasonable in its application to plaintiff's property, he ought not to be heard to complain. We cannot assume in advance that the council will do so.

The provision of the third section referring to the payment of city taxes upon property sought to be platted into lots and blocks is certainly not an unreasonable regulation and is strictly in line with the policy laid down by the legislature in §§ 1262, 1263, Bal. Code, making the payment of the state and county taxes a prerequisite to the filing with the county auditor of any plat of an addition to the city. The complaint does not allege the payment of the tax mentioned in the third section, or of the state and county taxes. It is evident also that the plat has not been referred to the city engineer, and that he has not made a report upon the same. It may meet with the entire approval of the council when it once gets before it, and, simply because the ordinance vests in the council certain discretionary powers, we cannot assume that the council will abuse that discretion by exacting any unreasonable conditions precedent to its approval, when the plat is finally brought before it.

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Syllabus.

Something is said in 'appellant's brief to the effect that the title of the ordinance is not broad enough to include the penalty provided for its violation; but however that may be, it will not affect the remainder of the ordinance, and is not necessary to a decision of this case.

The judgment is affirmed.

[No. 4537. Decided September 24, 1903.]

SEATTLE NATIONAL BANK OF SEATTLE, *Respondent* v.
J. B. POWLES, *Appellant*.¹

SALES—RECISSION—AGENCY—SUFFICIENCY OF EVIDENCE. Where defendant, a broker, paid a draft accompanying a consignment of fruit by a check to a collecting bank, which thereupon delivered the bill of lading to the defendant and gave notice to the drawer that the draft was paid, and defendant attempted to rescind the contract and stopped payment of the check upon discovering defects in the goods, in an action on the check the issue tendered in defendant's answer that the collecting bank was agent of the consignor is material to his defense of rescission, and is not supported by proof that it may have been agent for the consignor's bank, for the purpose of collection.

SAME. The draft appearing to have been purchased by the forwarding bank, the collecting bank rendered itself liable by delivering the bill of lading and giving notice that the draft was paid, and as these acts were instigated by the defendant, he must suffer the loss.

SAME—ESTOPPEL. The defense of rescission *in toto* of a contract upon which goods were consigned cannot be maintained where the defendant surrendered the bill of lading to the carrier, removed and sold a portion of the goods, retains the proceeds thereof, together with overcharges collected on the freight prepaid by the consignor, and stopped payment on his check only after notice had been given by the collecting bank that the draft was paid.

SAME—EVIDENCE—CUSTOM. In such a case it was competent to admit testimony on the part of the plaintiff as to what became

¹Reported in 73 Pac. 887.

of the goods and proceeds, and the rejection of evidence as to the custom of merchants as to the disposition of goods upon such consignments was not prejudicial error.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 3, 1902, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court. Affirmed.

Fred Rice Rowell, John L. Neagle, and William Welch, for appellant. Evidence of the custom of merchants as to sales of goods received on consignment was improperly rejected. *Schooner Reeside*, 2 Sumn. 567; *Hooper v. Chicago & N. W. R. Co.*, 27 Wis. 81; *The Delaware*, 14 Wall. 579; *Barber v. Brace*, 3 Conn. 9, 8 Am. Dec. 149; *Lapham v. Atlas Ins. Co.*, 24 Pick. 1; *Mazetti v. Smith*, 49 L. T., N. S., 580; *Boon v. Steamboat Belfast*, 40 Ala. 184, 88 Am. Dec. 761. The transfer of the bill of lading represented an actual delivery of the goods subject to equities, and did not preclude the appellant from asserting any defenses that he might have against the consignor. *Pollard v. Vinton*, 105 U. S. 7; *Emery's Sons v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Toledo etc. R. Co. v. Gilvin*, 81 Ill. 511; *Lickbarrow v. Mason*, 2 Smith's Lead. Cas., 1045 (9th Am. ed.); *Finch v. Gregg*, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679; *Landa v. Latin*, 19 Tex. Civ. App. 246, 46 S. W. 48. An actual change of possession is represented thereby. *First Nat. Bank of Cincinnati v. Kelly*, 57 N. Y. 36; *First Nat. Bank of Greenbay v. Dearborn*, 115 Mass. 219, 15 Am. Rep. 92; *Pratt v. Parkman*, 24 Pick. 42. This rule is not changed by Bal. Code, §§ 3598 and 3599. *Yarwood v. Happy*, 18 Wash. 248, 51 Pac. 461; *Shaw v. Railroad Co.*, 101 U. S. 557.

Bausman & Kelleher, for respondent.

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PER CURIAM.—This action was commenced by respondent, The Seattle National Bank, a corporation, against appellant, J. B. Powles, on June 6, 1894, in the superior court of King county. The cause came on for trial April 18, 1902. Judgment was rendered in the trial court May 3, 1902, in favor of respondent, for \$974.42, from which defendant prosecuted this his appeal. Respondent's cause of action is founded upon a certain bank check given by appellant, of which the following is a copy:

"Seattle, Wash. 11, 29, 1893. No. 400.

"Dexter Horton & Company, Bankers:

"Pay to Seattle National Bank or order \$619.50, Six hundred and nineteen 50-100 dollars.

"J. B. Powles."

Respondent alleges that it presented such check to the drawee for payment on December 1, 1893, which was refused under instructions from appellant. Appellant, by his answer, denies that he delivered the check in question at any time other than on December 1, 1893, and denies further that he received any consideration whatever for its issuance. For an affirmative defense appellant alleges that during the latter part of the year 1893 he and one E. H. Mote, of Leesburg, in the state of Florida, entered into a contract whereby said Mote agreed to ship to him (appellant) a carload of oranges from said Leesburg to Seattle, Washington, which were to be received at the latter city and sold by appellant as a broker on brokerage, which was to be paid by Mote; that it was also agreed that such oranges were to be shipped by Mote to appellant at the request of the former party; that said oranges were to be delivered to appellant at Seattle "in a perfectly sound and marketable condition," subject to examination and approval by the appellant upon their arrival; that it was also agreed, in the event of said oranges not being

in such condition upon their arrival, appellant was not to be bound or required to receive or accept the oranges, or any part thereof, as broker, or at all; that in case such oranges were in good condition appellant should pay to Mote the price therefor; that pursuant to said agreement Mote did ship a carload of oranges from Leesburg, Florida, consigned to the owner, Mote, at Seattle, where the oranges arrived on or about November 30, 1893; that at the same time Mote sent for collection to respondent bank his account for the purchase price of said oranges, as his agent, to make the collection from appellant; that on or about December 1, 1893, believing the oranges to be of the kind and quality called for by the agreement, the appellant made and delivered to respondent, as the agent of Mote, the above check, and immediately thereafter proceeded to remove said oranges from the car, when for the first time he discovered that they had been frozen *en route*, and were in an unsound and unmarketable condition; that immediately upon the discovery of the condition of the oranges, appellant stopped payment on such check, and notified the respondent thereof; that he refused to accept or receive the oranges, or any part thereof, and also notified respondent not to pay out any money on account of the above transaction, and also immediately notified Mote by telegraph as to the condition of and his refusal to accept or receive said oranges. Wherefore he alleges there was no consideration for the execution of the check.

Respondent, by its reply, puts in issue the material averments of the affirmative defense, and makes certain admissions, among which are those relating to the arrival of the carload of oranges, the stopping of the payment of the check, and notifying respondent thereof. It alleges that after giving the check appellant proceeded to remove

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the oranges from the car. Respondent specially denies that it was the agent of Mote, or that any account was ever sent to it by Mote for collection, or at all, or that appellant ever notified it not to pay out any money on account of the above transaction.

At the trial, after listening to the evidence on both sides, the superior court directed the jury to return a verdict for the amount claimed in favor of respondent. The evidence established the following facts: Appellant was, in the fall and winter of 1893, engaged in the fruit brokerage business in the city of Seattle. About September 20, 1893, negotiations by letter commenced between appellant and Mote with reference to placing oranges on the Seattle market and elsewhere in this state and in Oregon. The correspondence would indicate that on the part of appellant, up to the time of receiving information about the draft and bill of lading hereafter referred to, he had reason to conclude that the relation of shipper and broker existed between him and Mote. The respondent was not a party to these transactions, save as may hereafter appear. On the 25th day of November, 1893, the respondent bank received in the course of business for collection a sight draft drawn on appellant by Mote, payable to his order, for the sum of \$619.50. This draft was dated at Leesburg, Florida, November 15, 1893.

Accompanying such draft was a bill of lading for a carload of oranges, issued by the carrier at that point, wherein Mote was named both as consignor and consignee for the transportation of the oranges from Leesburg to Seattle; also a letter of instructions. Attached to the papers was a slip containing the following words: "Hold for arrival, wire Bank of Leesburg, Leesburg, Fla. When paid or refused. Of goods if necessary." The draft and bill of

lading were indorsed and delivered to the "Bank of Leesburg," together with the other documents, and were sent by it to respondent. Respondent notified appellant of the receipt of the draft and bill of lading, and he came to the bank and examined the documents, which was several days prior to the arrival of the oranges. Respondent allowed appellant to take possession of the bill of lading, also gave written permission to the railroad company for examination of the fruit. This was the day before the arrival.

The oranges arrived in Seattle on the 30th day of November, 1893, and on that day appellant and three other parties made an examination of them. Between 11 and 12 o'clock on the following day Powles called at the respondent bank, issued his check for the face of the draft, which was stamped "Paid" by respondent, and surrendered to him, he having retained the bill of lading. Powles proceeded to and did remove a considerable portion of the fruit (103 boxes). Afterwards on that day, he found that a large part thereof had been frozen, presumably on the route. Appellant then gave the drawee bank notice not to pay such check, withdrew his funds therefrom, and notified respondent before presentation that he would not pay the check, giving as his reason that the fruit was in an unmarketable condition.

In the meantime, between giving the check on the same day and notice to respondent, the latter had sent the Leesburg bank a telegram that the draft had been paid. About two hours afterwards the respondent wired again to its correspondent bank that payment on the check had been stopped. Correspondence as to this transaction was afterwards had between the two banks. Respondent paid the amount called for by the draft to its correspondent about the latter part of February, 1894. The bill of lading was not produced at the trial, appellant admitting

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that it had been surrendered, through his agency, to the railroad company, who refused to return it to him. It appears from the evidence, that from the good oranges Powles had received he realized \$130.92, that he also collected \$42.00 overcharges for freight paid on the carload of oranges as per contract with Mote, and that he retained these several amounts. He says that he offered to return the \$42.00 to the railroad company at Seattle. After hearing the evidence, the trial court took the case from the jury, and directed a verdict in respondent's favor.

Error is alleged on five distinct grounds: (1) In striking out the testimony of Powles as to the contents of the telegram and letter to Mote in ordering the oranges; (2) in refusing to admit testimony of competent witnesses as to what was the custom, at that time, in Seattle, where a sale was made of goods consigned as they were in this case; (3) in admitting evidence showing the amounts realized from the sales of the oranges not frozen; (4) by taking the question of agency of respondent from the jury; (5) in directing a verdict for the respondent.

In order to better understand the points made by appellant, they will be considered, as far as deemed material, in a somewhat different order from that alleged. Under the issues tendered by the appellant, it was an essential matter to his defense that he establish the fact of agency between respondent and Mote; but after carefully reading and considering all the testimony, oral and documentary, we fail to find anything tending to show such relationship. The evidence, considered in its most favorable light for the appellant, establishes, we think, that the respondent acted as the collector or agent of the Bank of Leesburg for the collection of the draft on Powles, with limited authority, of which appellant was fully advised, but that it was never the agent of Mote for any

purpose. The relations between the Leesburg bank and Mote did not appear. On the face of the record, however, that bank appears to be the purchaser of the draft. If this be so, then the respondent made itself liable to the Leesburg bank by surrendering the bill of lading and notifying the bank that the draft had been paid. As it did these things at the instigation of and because of the acts of the appellant, he cannot now be heard to complain because he made a too hasty or superficial examination of the oranges. If any one must suffer because of these acts, it must be the appellant, not the respondent.

But if we should conclude that the respondent was the agent of Mote, still we are of the opinion appellant's defense cannot be maintained. The law is that a party cannot ratify one part of a contract or transaction, which is beneficial to his interests, and disaffirm as to the remainder; that if he elects to rescind, he must do so *in toto*, within a reasonable time, in some unequivocal manner. Some writers on elementary law, as well as some courts, lay down the rule that the parties must be placed in *statu quo*. By alleging the check to have been given without consideration, appellant took the position that he elected to rescind the contract or transaction had with reference to the oranges. It seems, however, that he kept and still retains a considerable part of the consideration for the sale, or consignment of the oranges, together with some \$42.00 overcharged freight received from Mote. His position in that respect cannot be maintained. He must either elect to affirm the contract, and defend because of its breach, or rescind the same *in toto*. As he has done neither, he cannot be heard to dispute his liability on the draft. *Wainwright v. Weske*, 82 Cal. 193, 23 Pac. 12; *Snow v. Alley*, 144 Mass. 546, 11 N. E. 764, 59 Am.

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Rep. 119; *Gay v. Alter*, 102 U. S. 79; 24 Am. & Eng. Enc. Law, pp. 645-6.

"After a contract has been broken, whether by an inability to perform it, by a rescinding against right, or otherwise, the party not in fault may sue the other for the damages suffered; or, if the parties can be placed *in statu quo*, he may, should he prefer, return what he has received, and recover in a suit the value of what he has paid or done. The pursuing of the latter alternative is called rescission." Bishop, Contracts, § 842 (Enlarged ed.); *English v. Spokane Commission Co.*, 57 Fed. 451.

The above are only a few of the many authorities which may be cited on the general proposition of "rescission." There are some exceptions to this general rule, but the case at bar does not fall within the purview of any of them, as far as we have been able to learn, after a careful research. The logic of the situation forces us to the conclusion that appellant did not take the proper steps to effect the rescission of his contract, whether it was one for the sale of the merchandise, or a consignment on commission. Appellant's counsel have argued somewhat elaborately in their brief as to the rights of assignees of sight drafts and bills of lading, contending, that neither possess the qualities of negotiable paper, so as to cut off equities existing between the original parties to the transaction; that respondent stands in the shoes of Mote; and that he has the same defense that he would have had if Mote were suing for the purchase price. We have made a careful examination of the authorities cited on that point, particularly those referred to at length in the brief, besides some others. For the purposes of this controversy, as at present advised, we are not inclined to dispute the general propositions of commercial law enunci-

ated in them. But these citations are not applicable to the facts in this controversy. Here the appellant inspected the merchandise, surrendered the bill of lading into the possession of the carrier company, removed a part of the oranges from the car, took up the draft, issued his check, and only stopped payment after respondent had notified the Leesburg bank that the draft had been paid. By these acts he placed it out of his power to rescind. He could not return the bill of lading to the respondent, but this was no fault of the latter. We therefore think the trial court did not err in admitting testimony as to what became of the oranges received or their proceeds. In view of the admitted facts, the ruling out of testimony as to the custom among merchants, where a sale of the oranges was made, becomes immaterial, for, if it were true that such ruling was erroneous, it was error without prejudice.

No reversible error appearing in the record, the judgment of the superior court should be affirmed, and it is so ordered.

[No. 4596. Decided September 26, 1903.]

C. C. SMITH, *Respondent*, v. JOHN SULLIVAN, *as Chief of Police of City of Seattle, Appellant*.¹

POLICE JUDGE—TEMPORARY APPOINTMENT—AUTHORITY OF DE FACTO OFFICER. Under Laws 1899, p 137, § 11, authorizing the mayor to appoint a police judge *pro tem*. in the absence or disability of the regular judge, such appointee is a *de facto* judge, and his judgments are not subject to collateral attack by reason of the fact that the regular judge was not absent or disqualified and there was in fact no vacancy.

HABEAS CORPUS—QUESTIONING JUDGE'S TITLE TO OFFICE. On habeas corpus, the right of the judge ordering the commitment of

¹Reported in 73 Pac. 793.

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the prisoner to hold his office can not be inquired into, as that question is wholly distinct from the question of the jurisdiction of the court over the offense or the parties.

Appeal by John Sullivan, chief of police of Seattle, from a judgment of the superior court for King county, Griffin, J., entered September 8, 1902, discharging the applicant, C. C. Smith, from custody upon a writ of habeas corpus, and for costs, after a hearing upon the return to the writ showing a commitment from the police court of Seattle. Reversed.

Ellis De Bruler, for appellant. The appointment regular on its face constituted the officer a *de facto* judge and his judgments cannot be attacked collaterally. *Kennedy v. Commonwealth*, 78 Ky. 447; *State v. Fountain*, 14 Wash. 236, 44 Pac. 270; *State v. Carroll*, 38 Conn. 449; *Ex parte Strong*, 21 Ohio St. 610; *In re Boyle*, 9 Wis. 240; *State v. Bloom*, 17 Wis. 538; *Cooper v. Moore*, 44 Miss. 386; *Meagher v. County of Storey*, 5 Nev. 244; Thorpe, Public Officers, §§ 630-637, 650-652.

ANDERS, J.—On August 19, 1902, the petitioner and respondent, C. C. Smith, was tried and convicted in the police court of the city of Seattle, upon a complaint charging him with a violation of a certain city ordinance relative to disorderly persons, and sentenced to pay a fine of \$50, and, in default of payment, was committed to the city jail. Said trial was had before John F. Miller, who had been previously appointed police judge *pro tempore* by the mayor of the city to serve and act as such during the temporary absence of R. R. George, the police judge of said city. On August 25, 1902, the said defendant, Smith, applied to the superior court of King county for a writ of habeas corpus. In his petition for the writ he alleged, that he was illegally restrained

of his liberty at and in the city of Seattle by John Sullivan, chief of police of said city, and by him imprisoned in the city jail of said city; that the cause or pretense of said restraint and imprisonment, according to the best knowledge and belief of the petitioner, is as follows: that on August 19, 1902, said petitioner had an alleged trial before one John F. Miller on a complaint filed with said Miller, wherein said petitioner was charged with having violated a city ordinance defining the crime of disorderly persons, and at said alleged trial said Miller found the defendant guilty, and imposed a fine of \$50 against petitioner, and in default of the payment of said fine petitioner is illegally restrained of his liberty; that said restraint and imprisonment is illegal, and that the illegality consists in this; that the said John F. Miller, before whom the aforesaid complaint was filed and before whom the said alleged trial was had, and who rendered the said alleged judgment imposing the said fine on petitioner, had no right or authority whatever to attempt to hold court, or fine petitioner, and, in default of the payment of said fine, to order the imprisonment of said petitioner; that the Honorable Robert R. George is the police judge of the city of Seattle, and has the exclusive jurisdiction over all offenses defined by any ordinance of said city; and that on the 19th day of August, 1902, the said George, judge of said police court, was present in the city of Seattle, and there was no want of legal capacity whatever on the part of said George to preside at said police court on said 19th day of August, 1902, nor was the said George on the day last mentioned laboring under any disability whatever.

Upon presentation of this petition to the superior court, the writ was issued, directed to John Sullivan, as chief of police of the said city of Seattle. The said Sullivan

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filed a demurrer to the petition upon the ground that the facts alleged did not entitle the petitioner to the relief sought. The demurrer was overruled by the court, and an exception was duly taken. Thereafter the chief of police made his return to the writ, under oath, showing his official capacity, and that he had the petitioner, Smith, in his charge under and by virtue of a commitment from the police court of the city of Seattle, signed by John F. Miller as police judge, a copy of which was attached to and made a part of the return; and that on the 18th day of August, 1902, Hon. T. J. Humes, mayor of the city of Seattle, appointed the said John F. Miller to act as police judge during the temporary absence of R. R. George, police judge of said city. A certified copy of the appointment was also attached to the return and made a part thereof. At the hearing the court permitted Police Judge George, over the objection of counsel for the chief of police, Sullivan, to testify that at all times during the 18th and 19th days of August, 1902, he was within the corporate limits of the city of Seattle, and within the territory over which he, as police judge, had exclusive jurisdiction, but that during said days he was having a two-day vacation, and was serving on a committee of the Elks' carnival, then being held in the city of Seattle.

The court found from the evidence that the Honorable Robert R. George is, and was, on the 18th and 19th days of August, 1902, the judge of the police court of the city of Seattle; that at all times during said days the said George was present within the corporate limits of the city of Seattle, and within the territory over which he, as police judge, has the exclusive jurisdiction, and that at no time during said 18th and 19th days of August, 1902, was he absent from the said city, but was at all times actually present and available as judge of said police court

within the territory over which he, as such judge, has exclusive jurisdiction. As a matter of law, the court concluded "that said trial had before said John F. Miller, Esq., judgment rendered by him, and commitment thereon under and by virtue of which the said C. C. Smith is held, imprisoned, and restrained of his liberty by said respondent, John Sullivan, chief of police in and for said city of Seattle, is all without any warrant or authority at law, and absolutely null and void, and that the said C. C. Smith is illegally imprisoned and restrained of his liberty by said John Sullivan, chief of police for the said city of Seattle." And, by reason of the premises, the said Smith was discharged, and judgment for costs was rendered against the chief of police, from which ruling and judgment he has appealed.

It is provided in § 11 of an act approved March 13, 1899, entitled, "An act relating to justices of the peace and constables in cities of the first class, and fixing their number and salaries, and providing for making one of the justices elected in such cities a police justice, and defining his duties, jurisdiction and powers," that, "in case of the temporary absence or inability of the police judge to act, the mayor shall appoint, from among the practicing attorneys, qualified electors of the city, a police judge *pro tempore*, who, before entering upon the duties as such, shall take and subscribe an oath as other judicial officers, and while so acting he shall have all the powers of the police judge: *Provided, however*, such appointment shall not continue for a longer period than the absence or disability of the police judge." Laws 1899, p. 137. And it was under and by virtue of this provision of law that the mayor of the city appointed Mr. Miller police judge during the temporary absence of the regularly appointed and qualified judge. The appointment

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was in writing, and appears in full in the record, and that it was made in due form is not disputed. But we think we are fully warranted in concluding from the findings, conclusions, and judgment of the court below that the court was of the opinion that the mayor's appointment was unauthorized and ineffective, and conferred no judicial power upon his appointee, in this instance, by reason of the fact that, at the time of the appointment and of the arrest, trial, conviction and sentence of Smith, the police judge was personally within the city limits and within the territory over which the police judge has exclusive jurisdiction, and not incapacitated from discharging his judicial functions.

It must be conceded that a police judge *pro tempore* has all the powers of the police judge, for the above mentioned statute expressly so declares; and, that being so, it follows that the judgments of such temporary judge are as valid and binding as those of the regular police judge. And the law provides that the police judge in a city of the first class shall have exclusive jurisdiction over all offenses defined by any ordinance of the city, and full power and authority to hear and determine all causes, civil and criminal, arising under such ordinance, and to pronounce judgment in accordance therewith. Laws 1899, p. 135, § 3.

Our statute concerning habeas corpus provides that:

"No court or judge shall inquire into the legality of any judgment or process whereby the party is in custody, or discharge him when the term of commitment has not expired, in either of the cases following: 1. Upon any process issued on any final judgment of a court of competent jurisdiction. . . ." Bal. Code, § 5826.

And it appears from Smith's own petition that he was in the custody of the chief of police upon a process issued

on what purported to be a final judgment of a court of competent jurisdiction, and therefore the only question for determination was whether Mr. Miller was legally empowered to act as judge of that court. If he was so empowered, the superior court had no right, under the provision of the statute last above mentioned, to inquire into the legality of the commitment. And when it appeared—as it did appear at the hearing of the petition—that John F. Miller was exercising the functions of the office of police judge at the time of the trial and commitment of petitioner, and that he claimed the right to do so by virtue of a regular appointment by the legally constituted appointing power, the petitioner should have been immediately remanded to the custody of the chief of police, for the reason that he was not illegally restrained of his liberty. The appointment by the mayor of Miller to act as temporary judge conferred upon him all the power and jurisdiction, for the time being, possessed by any police judge of the city, and the judgments pronounced by him were, until reversed in an appropriate proceeding, of the same force and effect as the judgments of any other judge, or court, of competent jurisdiction.

Habeas corpus cannot operate as an appeal or writ of error. 9 Enc. Plead. & Prac., 1062. Nor is it a proper proceeding to test the right of even a *de facto* officer to hold a legally constituted office. *In re Boyle*, 9 Wis. 264; *State v. Bloom*, 17 Wis. 521; *Laver v. McGlachlin*, 28 Wis. 364; *Commonwealth v. Fowler*, 10 Mass. 290; *Fowler v. Beebe*, 9 Mass. 231, 6 Am. Dec. 62.

The jurisdiction of the court may always be inquired into on habeas corpus, but not the right of the judge to hold his office, which is a question wholly distinct from that

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of the jurisdiction of the court over the offense or the party defendant. *In re Boyle, supra*.

To permit one convicted of an offense to question on habeas corpus the right of the judge, before whom he was tried, to hold his office, would result in intolerable confusion, and in some instances, no doubt, in the defeat of justice. And this the policy of the law forbids. It appears clear to our minds that John F. Miller, while he was acting as police judge under the mayor's appointment, was a *de facto*, if not a *de jure*, judge. And if he was but a *de facto* officer, his acts as such officer were valid and binding as to the public, or any individual, other than the officer himself. Thorpe, Public Officers, §§ 622, 649; Mechem, Public Officers, § 328; *State v. Fountain*, 14 Wash. 236, 44 Pac. 270; *State v. Carrall*, 38 Conn. 449, 9 Am. Rep. 409; *Ex parte Strong*, 21 Ohio St. 610; *In re Boyle, supra*; *State v. Bloom, supra*.

What we have already said renders it unnecessary to discuss the errors assigned on the action of the court in the admission of testimony and in overruling the demurrer to the petition.

The order discharging the respondent, Smith, is reversed.

FULLERTON, C. J., and HADLEY, DUNBAR, and MOUNT, JJ., concur.

[No. 4686. Decided September 26, 1903.]

FRANK DURAND, *Appellant*, v. MICHAEL J. HENEY,
Respondent.¹

CONTRACTS—LATENT AMBIGUITY—CONSTRUCTION—WHEN QUESTION FOR JURY. Where a contract with an Alaska transportation company gave plaintiff the exclusive hauling of all its freight to A, specifying price and conditions, and required plaintiff to have on hand a large equipment therefor (which part plaintiff performed) and contained the further clause that in case of the falling off of freight to A the plaintiff should have the "preference over others in hauling freight to B or other points;" and it appears that at the time of the execution of the contract the Canadian government was agitating the exclusion of aliens at A which would, and shortly did, result in the falling off of freight to A, the clause for preference right in hauling to B is not void for uncertainty or indefiniteness, but is within the rule that the construction of a written contract is for the jury and not the court where a latent ambiguity is produced by extrinsic facts, showing the intent of the parties, or requiring construction by persons experienced in the calling engaged in.

Appeal from a judgment of the superior court for King county, Bell, J., entered December 8, 1902, upon the verdict of a jury rendered in favor of the defendant by direction of the court. Reversed.

Walker & Munn, for appellant. Where a doubt is produced by extrinsic facts, the construction of the contract is not one of law for the court, but the ambiguity is a latent one to be explained by parol evidence and submitted to the jury. *Carstens v. Earles*, 26 Wash. 676, 67 Pac. 404; *Wooster v. Butler*, 13 Conn. 309; *Warner v. Milttenberger's Lessees*, 21 Md. 264, 83 Am. Dec. 573; *Bartlett v. Nottingham*, 8 N. H. 300; *Ginnuth v. Blankenship etc. Co.* (Tex.), 28 S. W. 828; *Wilcox v. Baer*, 85 Mo. App. 587; *Kelly v. Fejervary*, 111 Iowa 693, 83

¹Reported in 73 Pac. 775.

N. W. 791; *Alworth v. Gordon*, 81 Minn. 445, 84 N. W. 454; *Wirth v. Kahlenberg*, 62 N. Y. Supp. 1030; *Thorn, etc. Co. v. St. Louis Expanded Metal etc. Co.*, 77 Mo. App. 21; *Camp v. Wilson*, 97 Va. 265, 33 S. E. 591; *Kanapolis Land Co. v. Morgan*, 1 Kan. App. 65, 41 P. 205; *Nashua Iron etc. Co. v. Chandler etc. Desk Co.*, 166 Mass. 419, 44 N. E. 348; *St. Louis S. W. Ry. Co. v. Bramlette*, (Tex. Civ. App.) 35 S. W. 25; *Enterprise Soap Works v. Sayers*, 55 Mo. App. 15; *Goodman v. Henderson*, 58 Ga. 567; *Deutmann v. Kilpatrick*, 46 Mo. App. 624; *Pollen v. Le Roy*, 23 N. Y. Sup. Ct. (10 Bosw.) 38; *Tiley v. Moyers*, 43 Pa. St. (7 Wright) 404; *Connecticut & P. R. Co. v. Baxter*, 32 Vt. 805. The part performance by the appellant was sufficient consideration to support the promise respecting freight to Bennett. *White v. Baxter*, 71 N. Y. 254; *Cottage Street etc. Church v. Kendall*, 121 Mass. 528.

John P. Hartman, for respondent. There was want of mutuality as to the freight to Bennett. *Clark v. Great Northern R. Co.*, 81 Fed. 282; *Blanchard v. Detroit etc. R. Co.*, 31 Mich. 43, 18 Am. Rep. 142; *Olney v. Howe*, 89 Ill. 557, 31 Am. Rep. 105; *Missouri K. T. R. Co. v. Bagley*, 60 Kan. 424, 56 Pac. 759; *Davie v. Lumberman's Min. Co.*, 93 Mich. 491, 53 N. W. 625. Contracts must be concurrent and obligatory upon both parties at the same time. *Utica & S. R. Co. v. Brinckerhoff*, 21 Wend. 139, 34 Am. Dec. 220; *American Cotton Oil Co. v. Kirk*, 68 Fed. 791; *Wilkinson v. Heavenrich*, 58 Mich. 574, 55 Am. Rep. 708; *Wagner v. Meakin*, 92 Fed. 76. The contract was too vague and uncertain to be submitted to the jury. *Barton v. Spinning*, 8 Wash. 458, 36 Pac. 439; *Pulliam v. Schimpf*, 109 Ala. 179, 19 South. 428; *Truitt v. Fahey*, 3 Pen. (Del.) 573, 52 Atl. 339; *Faulkner v. Des Moines Drug Co.*, 117 Iowa 120, 90 N. W. 585.

DUNBAR, J.—This is an action for damages for the alleged breach of the following written contract:

“Memorandum of Agreement between Chas. E. Severance of Skagway, Alaska, and The Red Line Transportation Co., by its manager M. J. Heney, Witnesseth.

“That the said Chas. E. Severance agrees to haul and deliver freight in a good condition from Summit of White Pass to Atlin City, B. C., for the price of twelve (12) cents per pound. And The Red Line Transportation Co. by its manager M. J. Heney agrees to pay the above price per pound for all freight safely delivered at its destination. The said company further agrees to give said Severance the exclusive hauling of all its Atlin freight at above price provided he can handle same, it also agrees to do all horseshoeing and repairing at reasonable rates based on cost, also to secure to him the benefit of a construction rate on feed and supplies to end of travel. Also in the case of Atlin freight falling off to give him the preference over others in hauling freight controlled by it for Bennett or other points. Settlements to be made monthly and said Chas. E. Severance to be allowed to draw when necessary 75 per cent. on all bills of lading after same has been accepted by said company. The said Chas. E. Severance on his part agrees to have on hand at Summit of White Pass and ready to begin freighting by Feby. 10th, '99 sixty (60) head of good serviceable stock together with harness and full equipment necessary for handling said freight, and that he will put forth every effort to secure the safe and rapid transit of all freight entrusted to his care. It is hereby distinctly understood and agreed that all freight so handled must be delivered at its destination in as good condition as when received and that the said Chas. E. Severance shall be fully responsible for any loss or shortages which may occur through negligence of his teamsters or any other cause whilst freight is in his charge.

“Skagway, Alaska,

Chas. E. Severance.

“Jan. 23rd, 1899.

Red Line Transportation Co.

“By M. J. Heney, Mgr.”

At the close of the testimony of both plaintiff and defendant, the plaintiff having disclaimed any claim for damages growing out of the failure to receive Atlin freight, the court took the case from the jury, or rather instructed the jury to bring in a verdict for the defendant, holding that the contract in relation to the Bennett freight was too indefinite and uncertain for enforcement. So that the question presented on this appeal is whether the meaning and purpose of the alleged contract is a question of law for the court or of fact for the jury.

It is conceded that the general rule is that the construction of written instruments is a question of law for the courts. We think it may also be conceded that there are certain well defined exceptions to this rule—as, where the identity of the subject-matter of a document, or its construction, depends upon collateral facts or extrinsic circumstances, the inferences from such facts, when they are proven, should be drawn by the jury. Where it is an enforceable contract, and the ambiguity arises as to the relative responsibilities and duties of the respective parties under the contract, which responsibilities and duties can be determined either by proof of the meaning of the terms used in the contract or by a showing of the circumstances surrounding the parties with reference to the subject-matter of the contract at the time it was entered into, and there is any controversy over such facts, undoubtedly such contract should be submitted to the jury, and its meaning determined by that tribunal by aid of such explanatory testimony. But whether or not the instrument sued on embraces all the necessary elements of a contract, such as parties, subject-matter, mutual assent, and consideration, is just as undoubtedly a legal question to be determined by the court. The first rule mentioned is founded in necessity, for words are frequently used in con-

tracts which have a technical or scientific meaning, or a meaning understood by certain tradespeople in a particular sense; or provincialisms may be employed where words or terms used would be meaningless beyond the boundaries of the locality where the contract was entered into; and these words, while conveying a definite meaning to the contracting parties, cannot be intelligently interpreted by either judge or jury, testimony having to be resorted to to explain them. Where there is any dispute as to what they mean, the inferences from such testimony must be drawn by the jury. A large array of authorities have been cited by both respondent and appellant. We have carefully examined them, but we think they only sustain the law as announced above, and that there is not so much question as to what the law on the subject actually is to whether the facts surrounding particular cases bring the case within the general rule or the exception.

Carstens v. Earles, 26 Wash. 676, 67 Pac. 404, is cited and relied upon by the appellant in support of his contention, while it is claimed by the respondent that the same case announces the law as contended for by him. The instruction under consideration in that case was the following:

"You are further instructed that all contracts, whether written or oral, that have been introduced in this case, are before you for your consideration and interpretation, together with the circumstances and surroundings of the parties, and it is for you to determine from all the circumstances and evidence of the case, the attitude and conduct of the parties, what was the real intention of the parties."

The court then says:

"It is urged that the instruction is in violation of the rule that contracts are to be construed by the court. Such

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is undoubtedly the general rule where there are no ambiguities, no conflicting contracts, and where there are no questions of abrogation or rescission calling for an interpretation. But where there are disputes as to the intentions of the parties to the written agreement, and questions of rescission by disputed oral agreements, then the consideration of the written contract in connection with the oral contracts becomes a question for the jury. In *Warner v. Miltenberger's Lessees*, 21 Md. 264, 83 Am. Dec. 573, it is said: 'But in our opinion, this question, as it arose in this case, was properly submitted to the jury. In support of this view, we refer to the case of *Wooster v. Butler*, 13 Conn. 309, where the point was carefully examined, and decided in accordance with what we consider the weight of authority. That case involved the construction of a grant, and the court say: "That the construction of written documents is a matter of law, and is not, in ordinary cases, to be submitted to the jury as a matter of fact, is true; but where the doubt is produced by the existence of collateral and extrinsic facts, not appearing upon the instrument, its consideration ceases to be a matter of mere legal construction, and the intention of the parties is to be sought for by a recurrence to the state of facts as they existed, when the instrument was made, and to which the parties are to be presumed to have reference. The ambiguity, in such cases, is a latent one, which may be explained by parol evidence, and submitted to the jury."'

We think that what was said by this court in the above case, as well as in the case therein quoted, tends very strongly to sustain appellant's contention. It appears from the record, that the White Pass & Yukon Route was a corporation owning and operating a railroad from Skagway, Alaska, to White Pass at the summit of the Coast Range, a distance of twenty-one miles from Skagway; that said corporation, among other things, was contracting for and carrying freight from Skagway to various points in the interior of Alaska, British Columbia, and

Yukon Territory, by way of its railroad to White Pass, and thence by pack trains consisting of mules and horses; that the defendant had a contract with said corporation, whereby the defendant had exclusive handling of all freight from White Pass to points of destination in the interior of Alaska, British Columbia, and Yukon Territory for which freight should be booked or contracted for by the White Pass & Yukon Route at Skagway; that the Canadian government was at that time agitating the question of prohibiting aliens from obtaining title to placer mines in the Atlin country, and a law to that effect was passed by the British Columbia legislature shortly after the execution of this contract, which accounted for the failure of the Atlin freight. When the defendant entered into a contract with the plaintiff in this case, it was probably with reference to this condition of things, which may tend to throw some light upon the seeming obscurities of the contract. Certain it is that there are ambiguities in this contract which need explanation, and disputes as to the intention of the parties to the written agreement. Under such circumstances, as was said by this court in the case above quoted, the construction of the contract becomes a question for the jury; and the doubts that cloud the contract in this case, being produced by the existence of collateral, extrinsic facts, as was said in *Wooster v. Butler, supra*, "the intention of the parties is to be sought for by a recurrence to the state of facts as they existed when the instrument was made and to which the parties are to be presumed to have reference." The trial court, in passing on this question, after stating that Severance, with whom the contract was made (the plaintiff in this case being Severance's assignee), and Heney, the defendant, being familiar with

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the conditions, anticipated that the freight from White Pass to Atlin might possibly fall off, and therefore entered into the agreement with reference to the Bennett freight, both foreseeing the contingency which afterwards did arise, viz., the falling off partially or altogether of the Atlin freight, said:

"The various conditions and obligations of the contract clearly refer to the hauling of the Atlin freight; the gathering of the equipment; the size of the equipment; the amount to be paid for the transportation of freight, and all other features of the contract, except the one clause, to which I shall hereafter refer, refer to the hauling of freight from the terminus of the White Pass road to Atlin. The clause to which I refer is the one discussed by counsel at length, and which is as follows: 'Also in the case of Atlin freight falling off, to give him the preference over others in hauling freight controlled by it, to Bennett and other points.' With the other features of the contract eliminated, this clause practically stands alone for construction, and in construing it we can get little or no aid from the other parts of the contract in regard to the Atlin freight. The parties provided that the plaintiff should have the exclusive handling providing for the other freight; the agreement is simply to give him the preference over others; so, as I say, throughout the contract, the various clauses refer only to the Atlin freight, and it leaves this part of the contract standing alone for construction."

The court then proceeds to say that the clause is too indefinite and uncertain to base a recovery upon. But we are not convinced, from reading the contract, that the various conditions and obligations of the contract do refer to the hauling of the Atlin freight. The contract must be construed all together, and was evidently intended by the parties to it to be so construed. The very fact stated by the court that the parties to the contract fore-

saw the possibility of the failure of the Atlin freight, and made provision in regard to the hauling of the Bennett freight, tends to show that that clause was placed there for the protection of the plaintiff, to insure him against loss, by a substituted employment in case of the failure of the Atlin freight. The partial execution of the contract on his part by getting together the stock which he did and transporting it to the terminus of the White Pass route, was justified only upon the theory that, if the Atlin freight failed, he would still have the Bennett freight to recompense him for his outlay. It is true that there is no stated price provided in the contract for the conveyance of the Bennett freight, but in such case the ordinary or going price is always presumed, and, with the exception of the stated price, the contract with reference to the Bennett freight seems to be about as definite as that portion which relates to the Atlin freight.

It seems to us that, while this contract is brief and ambiguous, it is not devoid of the essential requisites of a contract; that there are proper parties to the contract, proper subject-matter, consideration, and mutuality, and part performance on the part of the plaintiff. It is a uniform statement of the law that, in the construction of contracts, if there is a doubt as to their validity, that doubt should be solved in favor of the contract. The rule announced above, that where there are latent ambiguities, the construction is for the jury, it seems to us applies to just such a case as this. And we think that the question of what is meant by the terms of this contract, and especially by the provision, "also in the case of the Atlin freight falling off, to give him the preference over others in hauling freight controlled by it for Bennett or

other points," is a question which might very profitably, under the circumstances surrounding this case, be submitted to the testimony of packers and people who are engaged in the transportation business. To them the language might be significant, and the rights and duties of the parties clearly understood. The issues were directly made up, the defendant denying all the allegations of the complaint. The testimony adduced was not only extensive, but exhaustive, and we think that it would be a safer rule under the circumstances to submit the construction of this contract to a jury.

The judgment will be reversed, and a new trial ordered.

ANDERS, HADLEY, and MOUNT, JJ., concur.

FULLERTON, C. J., concurs in the result.

[No. 4553. Decided September 26, 1903.]

PACIFIC BRIDGE COMPANY, *Respondent*, v. UNITED STATES
FIDELITY AND GUARANTY COMPANY, *Appellant*.¹

CONTRACTOR'S BOND—ACTION ON—SUFFICIENCY OF COMPLAINT. A complaint on the bond of a subcontractor is sufficient where it sets out the contract and bond requiring him to pay all claims and alleges that he incurred indebtedness in prosecuting the work which the plaintiff was required to pay, and that reimbursement was refused upon demand.

SAME—PLEADING—SUPPLEMENTAL COMPLAINT. In an action on a subcontractor's bond to recover the amount of indebtedness which he had incurred and refused to pay, it is proper to allow a supplemental complaint for the recovery of further damages, incurred in completing the work after the action was commenced which was the result of the same breach.

SAME—LIMITATION OF SUIT. Where an action on a bond is commenced within the six months limitation contracted for, a supplemental complaint for further damages arising since the

¹Reported in 73 Pac. 772.

action was commenced is not barred because not filed within six months after the original breach of the bond.

PARTIES—FAILURE TO SERVE PRINCIPAL DEFENDANT—LIABILITY OF SURETY. In an action on a joint and several bond, an objection to any evidence because of the failure to bring the principal into court is properly overruled, since the statute authorizes a joint or several suit at the option of the plaintiff.

SUBCONTRACTOR'S BOND—EVIDENCE—CITY AS OBLIGEE. In an action brought by a contractor upon the bond of a subcontractor upon city work, to recover the amount paid out for labor and supplies in completing defendant's contract, the plaintiff's bond to the city, given under a statute requiring a contractor to give bond to pay all such labor and supply claims, is admissible in evidence, although running to the city instead of to the state, as required by law, as it is a good common law bond requiring plaintiff to make the payment.

INDEMNITY BONDS—CONSTRUCTION. A surety company's bond for the faithful performance of the work of a subcontractor is in the nature of an insurance policy, not to be construed *strictissimi juris*, and general clauses appended to the principal contract authorizing changes should be considered part of the subcontract and admissible against the surety.

SAME—DISCHARGE OF SURETY—ALTERATIONS IN PLANS. The surety of a subcontractor is not discharged by alterations in the work called for, when the contract authorized the city engineer to make the changes complained of. (*Cowles v. United States Fidelity & Guaranty Co.*, 32 Wash. 120, followed.)

Appeal from a judgment of the superior court for King county, Bell, J., entered July 30, 1902, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, after overruling defendant's motions for a directed verdict or a nonsuit. Affirmed.

Burke, Shepard & McGilvra, for appellant. The defendant's liability is not well pleaded; it is *strictissimi juris*, and there can be no recovery unless it is so nominated in the bond. *Blair v. Perpetual Ins. Co.*, 10 Mo. 559, 47 Am. Dec. 129; *Dunlap v. Eden*, 15 Ind. App. 575, 44 N. E. 560; *City of Sterling v. Wolf*, 163 Ill.

467, 45 N. E. 218; *First Nat. Bank v. Goodman*, 55 Neb. 418, 77 N. W. 756. The supplemental complaint introduces a new cause of action, which cannot be done. *Davis v. Erickson*, 3 Wash. 654, 29 Pac. 86; *Buchanan v. Comstock*, 57 Barb. 582; *Swedish-Am. Nat. Bank v. Dickinson County*, 6 N. D. 222, 60 N. W. 455. It was upon a separate breach of a distinct condition of the bond, a proper subject for a separate action or count. *Beach v. Barons*, 13 Barb. 305; *United States v. National Surety Co.*, 92 Fed. 549. The original complaint being insufficient, the action cannot be sustained by a supplemental complaint founded upon subsequent facts. *McCullough v. Colby*, 4 Bosw. 603; *Candler v. Pettit*, 1 Paige 168, 19 Am. Dec. 399; *Stillwell v. Van Epps*, 1 Paige 615. The supplemental complaint was not filed within six months of the breach, and the cause cannot be enlarged by adding matters in respect of which the statute has run before the amendment. *Holmes v. Trout*, 7 Pet. 171; *Miller v. McIntyre*, 6 id. 61; *Alexander v. Pendleton*, 8 Cranch, 462. The surety was discharged by the changes in the work contracted for, because they were not within the reasonable contemplation of the parties. *United States v. Freel*, 92 Fed. 299; *O'Rourke v. Burke*, 44 Neb. 821, 63 N. W. 17; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Miller-Jones Furn. Co. v. Ft. Smith Ice etc. Co.*, 66 Ark. 287, 50 S. W. 508; *Livingston v. Moore*, 44 N. Y. Supp. 125; *O'Neal v. Kelley*, 65 Ark. 550, 47 S. W. 409; *House v. American Surety Co.*, 21 Tex. Civ. App. 590, 54 S. W. 303; *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397; *Nichols v. Palmer*, 48 Wis. 110.

Piles, Donworth & Howe, for respondent. The filing of the supplemental complaint was properly allowed. *Buckley v. Buckley*, 12 Nev. 423; *Belles v. Miller*, 10

Wash. 259, 38 Pac. 1050; *Edgar v. Clevenger*, 3 N. J. Eq. 258; *Allen v. Taylor*, 3 N. J. Eq. 435, 29 Am. Dec. 721; *Baker v. Bartol*, 6 Cal. 483; *Jaques v. Hall*, 3 Gray 194. The change in the work is presumed to have been made in accordance with the terms of the contract authorizing it. *American Surety Co. v. Lauber*, 22 Ind. App. 326, 53 N. E. 793. When provided for in the contract, changes will not operate to discharge the surety. *De Mattos v. Jordan*, 15 Wash. 378, 46 Pac. 402; *Moore v. Fountain* (Miss.), 8 South. 509; *Dorsey v. McGee*, 46 N. W. 1018; *Village of Chester v. Leonard*, 68 Conn. 495, 37 Atl. 397; *Philadelphia v. Stewart*, 201 Pa. St. 526, 51 Atl. 348; *McLennan v. Wellington*, 48 Kan. 756, 30 Pac. 183; *Hayden v. Cook*, 34 Neb. 670, 52 N. W. 165; *Risse v. Hopkins Planing Mill Co*, 55 Kan. 518, 40 Pac. 904; *Drumheller v. American Surety Co.*, 30 Wash. 530, 71 Pac. 25. The bond was in the nature of an insurance policy, and is to be construed accordingly. *Bank of Tarboro v. Fidelity & Deposit Co.*, 128 N. C. 366, 38 S. E. 908; *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552.

DUNBAR, J.—This is an appeal from a final judgment for plaintiff in an action on a bond given to plaintiff, the contractor in chief for the construction of subdivision No. 1 of the Cedar River water supply system of the city of Seattle, by the defendant Charles P. Church, a subcontractor for the performance of the excavation on a certain part of that subdivision, and by the defendant, the United States Fidelity & Guaranty Company, as his surety, conditioned for the faithful performance of his contract, etc. The defendant Church was never served with process, nor has he appeared in the action, and the judgment appealed from runs only against his surety, the appellant.

The memorandum of agreement and bond are too long for entry here, but they are not essentially different from ordinary contracts and bonds in such cases. Church entered upon the performance of the contract and incurred indebtedness for provisions and supplies amounting to \$286.93, and to laborers for work done, \$607.21. Respondent demanded of Church that he pay these amounts, and, upon his refusal, respondent, in order to protect itself from liability upon the bond which it had executed to the city, paid these claims. It may be stated here that the respondent had executed a bond under the provisions of the statute requiring such bond to be given to municipal corporations, of which we will speak hereafter. Church failing to complete the contract, appellant was notified by the respondent of his failure. The appellant wrote to respondent, denying all liability under the bond, and insisting that the contract had been violated by respondent, and had not been violated by the contractor, Church. Thereafter respondent completed the contract, and within six months from the first breach instituted suit against appellant for the amount of \$894.14, which we have mentioned above, and which was all that was due by reason of the breach of the contract at that time.

After completing the work, the respondent, by leave of the court, filed an amended and supplemental complaint, setting up the performance of the work by respondent, and the cost thereof. The amended and supplemental complaint alleges the facts set forth in the original complaint, and the additional facts that the contract work had been completed, that respondent had been compelled to pay out for such work the sum of \$21,003.59, which was the reasonable cost of completing the contract, and that all of

said sum except the sum of \$894.14 was paid by respondent since the institution of the first suit; that for said work respondent had been paid by the city of Seattle the sum of \$17,244.37; that, by reason of the failure of Church to perform the contract, and by reason of the failure of the defendants to repay the respondent the amount which the respondent had been compelled to pay for the performance of the contract over and above the sum which the city had paid it, the conditions of the bond had been broken, and respondent had been damaged in the sum of \$3,759.22, and demand was made for that sum. At the trial the court limited respondent's right of recovery to the amount paid out by respondent for work, labor, and material in the prosecution of the work, which amounted to the sum of \$2,831.93, for which judgment was obtained by directed verdict, there seeming to be no disputed questions of fact.

This judgment is appealed from, and the following errors assigned: (1) Error in overruling appellant's demurrer to the complaint; (2) in granting the plaintiff leave to file the amended and supplemental complaint, and in overruling appellant's demurrer thereto; (3) in overruling the appellant's objection to evidence of the new matter pleaded in the amended and supplemental complaint; (4) in overruling the appellant's objection to any evidence for the plaintiff on the ground of defect of parties defendant; (5) in admitting in evidence the bonds given by the plaintiff to the city of Seattle in connection with the contract in chief between the plaintiff and the city; (6) in admitting in evidence certain sections of the general clauses appended to the contract in chief; (7) in admitting sundry insufficient and incompetent evidence to prove the plaintiff's expenditures in completing the work

embraced in the subcontract in suit; (8) in admitting sundry evidence of improper items as part of said expenditures; (9) in denying appellant's motion for nonsuit; (10) in excluding sundry evidence offered by appellant tending to establish certain affirmative defenses pleaded on its part; (11) in refusing to direct a verdict in favor of appellant and in directing a verdict in favor of plaintiff for the sum of \$2,831.93; (12) in denying appellant's motion for a new trial and entering judgment on the verdict.

Concerning the first assignment, we think the liability of the defendants upon the bond was well established in the original complaint. It is possible that, in response to a motion to make more definite and certain, the cause of action might have been stated with a little more particularity, but the whole complaint sets forth the contract and the bond. The arrangement in which they appeared in the complaint could not be material. Under the provisions of the bond it was Church's duty to faithfully perform his contract and to pay the claims of any person against the respondent or himself, caused by any wrongful acts of either omission or commission on his part, in relation to the contract, and to save the respondent harmless from any loss in that regard. It is alleged in the complaint that Church had incurred indebtedness in the prosecution of the work under the contract, that he had not paid the claims growing out of such indebtedness, but that respondent had been compelled to pay them, and that he had refused, upon demand, to reimburse respondent. We think the complaint contains a plain and concise statement of facts, and that the appellant was not left in doubt as to the cause of the action. The demurrer to the complaint was, therefore, properly overruled.

Appellant's second contention is that the court erred in permitting respondent to file its amended and supplemental complaint; that said complaint was demurrable (1) for insufficiency; (2) because the additional liability claimed therein was barred by the limitation of suit contracted for in the bond. We do not think the trial court abused its discretion, or erred in permitting the filing of the supplemental complaint. It was not a different cause of action that was pleaded. The cause of action was the breach of the contract, and upon this breach was based the claim for damages in both the original and supplemental complaint. The supplemental complaint was simply for the recovery of damages incurred subsequent to the filing of the original complaint, but which had resulted from the same breach. The practice of incorporating such a complaint in the original action is not only permissible, but is commendable practice, tending to avoid a multiplicity of suits. All this, outside of the necessity of commencing the action within the time stipulated for the limitation of actions after the breach, and of the avoidance in a separate action of the question of former adjudication. The 21st Enc. Plead. & Prac., at page 17, after announcing the well established rule that a bad title, set up in the original bill, cannot be aided by a supplemental bill, setting up a new and distinct title which has been acquired since the filing of the original bill, adds:

"But where the complainant sets forth in his original bill a title which is sufficient to entitle him to the relief prayed, it is permissible to file a supplemental bill setting up a newly acquired interest which enlarges his rights and authorizes the court to give him greater and more extended relief."

The claim for damages was in time, and the supplemental complaint properly sustained.

This disposes also of appellant's third contention—that the objection to the evidence under the supplemental complaint was improperly overruled. Nor do we think that the court erred in overruling objections to the admission of any evidence in support of respondent's case on the ground of defect of parties defendant. Church, the party contracting with the respondent, and the principal in the bond sued on, was joined with the appellant in the title of the cause, but was never served with process, and never appeared. This contention seems to be based upon the theory that, Church not having had his day in court, the appellant, upon satisfying the judgment, could have no effective subrogation to the respondent's rights as against Church. But this was a joint and several obligation, and the statute provides that persons severally liable upon the same obligation or instrument may, all or any of them, be included in the same action at the option of the plaintiff. We think the statute so plainly answers the objection that it precludes further discussion.

The fifth contention is that the court erred in admitting in evidence, over appellant's objection, bonds given by the respondent to the city of Seattle. The bonds were given under the statute requiring a municipal corporation contracting for public works to exact of the contractor a bond conditioned to pay laborers, materialmen, etc., and all indebtedness incurred in the performance of the work, and the statute provides that the bond shall run to the state of Washington. The respondent, to sustain its contention that it was bound to pay certain labor and supply claims, introduced a bond which, it is conceded, met the requirements of the law with the exception that it ran to the city of Seattle as obligee instead of to the state

of Washington. Whether or not the bond was in all essentials a statutory bond, it was a good common-law obligation, which the respondent and the city had a right to enter into, and which, therefore, would have bound the respondent according to its terms. The decisions of this court in *State ex rel. Bartelt v. Liebes*, 19 Wash. 589, 54 Pac. 26, and *Baum v. Whatcom County*, 19 Wash. 626, 54 Pac. 29, are conclusive on this question.

We also think that the general clauses appended to the contract were part of the subcontract in suit, and were properly admitted in evidence. The contract is too long to be set forth in this opinion, but, so far as the changes in the contract of which appellant complains are concerned, the contract provides that the Cedar River water supply system shall be constructed according to the maps and profiles prescribed by the city engineer, and in accordance with the plans and specifications required by the contract entered into between the Pacific Bridge Company and the city of Seattle, with certain exceptions specified; while such specifications provide, among other things, in language comprehensive enough to embrace the changes complained of, that the city engineer shall have the right to make changes. The merits of this controversy, viz., the contention that the guaranty company stands discharged of its liability by reason of the departure of the respondent and the subcontractor, Church, raise a question lately passed upon by this court in *Cowles v. United States Fidelity & Guaranty Company*, 32 Wash. 120, 72 Pac. 1032, where, after a review of the authorities, it was held that the assurance company could not invoke the doctrine of *strictissimi juris* in the construction of its contract, and that bonds of this character were in their nature insurance contracts and should be

construed as contracts for compensation. In that case the building contract upon which the bond was based provided that no alterations should be made except on a written order of the architects, and that, when so made, the value of the work added or omitted should be computed by the architects, and the amount added to or deducted from the price. It was held that a waiver of the requirements of a written order by the contractor did not relieve a compensated surety from liability, and that the surety, by his bond, became a party to the contract, identified with the contractor. We are satisfied with the views expressed in that case, and, in accordance therewith, decide that the appellant in this case is not relieved from the responsibility of its obligation.

Without specifically reviewing the evidence admitted to prove and support different claims, we think it was competent and sufficient, and that, therefore, the court did not commit error in denying appellant's motion for a nonsuit. Nor do we think there was any reversible error in the exclusion of testimony, in denying appellant's motion for a new trial, or in entering judgment for the respondent.

The judgment is therefore affirmed.

FULLERTON, C. J., and ANDERS, HADLEY, and MOUNT, JJ., concur.

[No. 4726. Decided September 26, 1903.]

JOHN REILLEY, *Appellant*, v. E. A. ANDERSON, *Respondent*.¹

APPEAL—CONCLUSIVENESS OF STATEMENT OF FACTS—NOTICE OF FINDINGS. A duly certified statement of facts to which no amendments were proposed reciting that a party was present at the time findings were settled and that he argued upon the same, conclusively shows that such party had notice of the findings.

SAME—FAILURE TO EXCEPT TO FINDINGS. Where no exceptions to findings of fact are stated when the findings are signed in the presence of the party, and none are filed within five days thereafter, as required by Bal. Code, § 5052, the evidence will not be reviewed on appeal.

EXECUTION—NOTICE OF SALE—SALE OF LEASEHOLD. Bal. Code, § 5274, regulating execution sales of real estate "or any interest therein," governs the sale of the interest of a lessee of state lands, and such a sale made upon the notice provided for sales of personal property is void.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 14, 1903. Affirmed.

James Hopkins, for appellant.

Post, Avery & Higgins, for respondent.

HADLEY, J.—This is an appeal from a judgment of the superior court of Spokane county, affirming a decision of the board of state land commissioners. Respondent held a lease for certain lands belonging to the state. Appellant claimed to have some interest in said lease by virtue of an alleged execution sale of respondent's interest. Some record was made in the office of the board of state land commissioners recognizing appellant's claim under such execution sale. Respondent moved the afore-

¹Reported in 73 Pac. 799.

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said board for an order vacating and setting aside all orders theretofore made which in any way recognized appellants claim under said lease. An order to show cause why the motion should not be granted was issued by said board, and upon the hearing thereof it was determined that the motion should be sustained. On appeal to the superior court the above action of the board was sustained, and this appeal is from the judgment entered by that court.

There are three assignments of error based upon the court's findings of facts. Respondent urges that appellant is not entitled to have these findings reviewed for the reason that no sufficient exceptions were taken thereto. The record shows that the findings were signed and filed on the 14th day of February, 1903, and that the exceptions thereto were filed March 27, 1903. Appellant's counsel states in his brief that he was not present at the time the findings were signed, and had no knowledge or notice thereof. However, we find with the record a statement of facts proposed by respondent, and duly settled and certified by the court. That statement recites that at the time the findings were settled and signed appellant's counsel was present, and made an argument before the court, and that the findings and conclusions were then signed by the court and filed in the presence of counsel for both parties. Notice of the filing of said proposed statement was given to appellant's counsel, and a copy thereof served upon him; but we find no proposed amendments thereto, and, since it is duly certified, it must be held to speak the truth. It therefore appears that, although appellant's counsel was present when the findings were signed, yet, from the dates set forth in the record, no exceptions were filed for more than forty days

thereafter. It not appearing that any exceptions were stated to the judge at the time the findings were signed, in accordance with § 5052, Bal. Code, it follows, under the further provisions of said section, that written exceptions should have been filed within five days after the findings were filed. In the absence of such exceptions an appellant is not entitled to have the evidence reviewed here. *National Bank of Commerce v. Seattle Pickle & Vinegar Works*, 15 Wash. 126, 45 Pac. 731. It follows, therefore, that the evidence in this case is not reviewable, and the findings cannot be disturbed.

The only remaining assignment is that the court erred in rendering judgment for respondent. If the judgment follows as a matter of law from the findings as made, then no error can be urged against it on this appeal. The court found that the lease was made to respondent by the state, and that he has at all times since its execution paid or tendered all rents due thereunder; that the attempted execution sale of said lease under which appellant claims was conducted by the sheriff of Spokane county as a sale of personal property, and not as a sale of real estate, or as an interest in real estate; that the procedure required by the law of 1897 (Laws 1897, p. 70) for the execution sale of real estate or an interest therein was not complied with; that the sheriff did not, as required by law, give respondent any notice that said leasehold interest, or any interest in said land, was to be sold, or that the same had been levied upon; that neither the state of Washington nor the board of state land commissioners ever entered into a lease with appellant for said lands, and the lease of respondent has never been canceled or annulled. From the facts as found, the court

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entered as conclusions of law, that respondent is the owner of said lease, that appellant has no interest therein, and that the decision of the state board of land commissioners should be affirmed. Judgment to that effect was accordingly entered, and we think the conclusions of law and judgment legally followed from the facts found.

The attempted sale was made under the law of 1897. That law, as found in § 5274, Bal. Code, provides that, when an execution sale of real estate "or any interest therein" is to be made, it is the duty of the judgment creditor "to deliver to the sheriff a true statement, signed by himself or attorney, containing a description of the property levied upon, the estimated value of each separate description, and serve a copy upon the judgment debtor or his attorney." The above requirement was not complied with by the judgment creditor, as found by the court, and respondent did not, therefore, receive the notice of the contemplated sale intended by that section. He was thereby prevented from exercising his right under the following section (5275) to except to the judgment creditor's valuation of the property. Moreover, the sale was made as though it were a sale of personal property. The posting of notices for ten days, as in the case of execution sales of personal property, is not, under the statute, sufficient for the sale of real estate or an interest therein. In the latter case, the notices must not only be posted for a period of four weeks prior to the sale, but must also be published once a week for a like period in a newspaper. Section 5274, *supra*, clearly recognizes that any interest in real estate shall be sold in the same manner as the land itself. A leasehold estate in land for a term of years is an interest in the land. *Chicago Attachment Co. v.*

Davis Sewing Machine Co., 142 Ill. 171, 31 N. E. 438, 15 L. R. A. 754; *Sanford v. Johnson*, 24 Minn. 172.

It is true, at common law a leasehold interest in land passes to the personal representative of a deceased owner. 11 Am. & Eng. Enc. Law (2d ed.) p. 839. But while such an interest in land may partake of the nature of personalty, and may for some purposes be classified as such, yet it is competent for the legislature to provide by statute that it must be sold under execution in the same manner as real estate, and the rule with relation to such a sale of a leasehold interest is stated as follows:

"Under statute in some jurisdictions, leasehold interests are to be seized and levied upon as realty. But it seems to be the prevailing rule that, apart from statute, such interest should be levied upon as personalty." 11 Am. & Eng. Enc. Law (2d ed.) 629.

In harmony with the above rule, since a leasehold is an interest in real estate, and since the statute cited provides for its sale in the same manner as the land itself, it follows that under the statute in the case at bar the attempted sale of the leasehold in the manner provided for personal property sales was a substantial failure to comply with the law, and the sale was therefore void.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, ANDERS, and MOUNT, JJ., concur.

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Citations of Counsel.

[No. 4545. Decided September 28, 1903.]

*In the Matter of the Estate of NANNIE D. FIELD,
Deceased.*

O. C. MOORE, as Administrator, Appellant, v. C. P.
COEY, Respondent.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of evidence is harmless where there is a trial *de novo* on appeal.

ADMINISTRATORS—CONTRACT TO ACT NOMINALLY—VALIDITY—WAIVER OF FEES. Where a surviving husband acquires all the interests of other heirs in the community realty, and there are no debts, he may employ a person to act as administrator in a formal manner for the purpose of clearing the title, under an agreement waiving the statutory fees allowed administrators, and without surrendering possession or giving up the management of the estate.

SAME—STATUTE OF FRAUDS—PERFORMANCE WITHIN ONE YEAR. Such an agreement, not in writing, is not void as against the statute of frauds because not to be performed within one year, since it was but a waiver of rights, calling for no specific thing to be done.

SAME. Moreover the necessity of such duration, not the expected duration, is the test, and does not bring such contract within the statute.

SAME—PART PERFORMANCE—ESTOPPEL. After part performance of such a contract, by accepting the office, the administrator will be estopped from alleging its invalidity.

Appeal by O. C. Moore, administrator of the estate of Nannie D. Field, deceased, from an order of the superior court for Spokane county, Belt, J., entered June 14, 1902, denying his petition for an accounting, after a hearing upon the merits. Affirmed.

Happy & Hindman and *Cullen & Dudley*, for appellant. An oral contract which cannot be performed within one year is within the statute of frauds, and "void." *Cum-*

¹Reported in 73 Pac. 768.



nings v. Stone, 13 Mich. 70; *Frary v. Sterling*, 99 Mass. 461; *Carney v. Mosher*, 97 Mich. 554, 56 N. W. 935; *Reynolds v. First Nat. Bank*, 62 Neb. 747, 87 N. W. 912; *Warner v. Texas & P. R. Co.*, 54 Fed. 922; *Packet Co. v. Sickles*, 5 Wall. 580; *Van Dyke v. Clark*, 19 N. Y. Supp. 650; *Groves v. Cook*, 88 Ind. 169, 45 Am. Rep. 462; *Summerall v. Thoms*, 3 Fla. 298; *Foote v. Emerson*, 10 Vt. 338; 33 Am. Dec. 205; *Jackson Iron Co. v. Negaunee Concentrating Co.*, 65 Fed. 298; *Broadwell v. Getman*, 2 Denio, 87; *Kansas City etc., R. Co. v. Conlee*, 43 Neb. 121, 61 N. W. 111; *Baker v. Codding*, 18 N. Y. Supp. 159; *White v. Levy*, 93 Ala. 484, 9 South. 164; *White v. Holland (Ore.)*, 3 Pac. 573; *Swift v. Swift*, 46 Cal. 266; *Hearne v. Chadbourne*, 65 Me. 302; *Sharp v. Rhie*, 55 Mo. 97. The contract required the administrator to violate the law and was void as against public policy. *Cox v. Grubb*, 47 Kan. 435, 28 Pac. 157, 27 Am. St. 303; *Forsyth v. Woods*, 11 Wall. 484; *Deobold v. Opperman*, 111 N. Y. 531, 19 N. E. 94, 7 Am. St. 760, 2 L. R. A. 644; *Moss v. Cohen*, 32 N. Y. Supp. 1078; *Specht v. Collins*, 81 Tex. 213, 16 S. W. 934; *Zimmerman v. Kinkle*, 108 N. Y. 282, 15 N. E. 407; *Foote v. Emerson*, 10 Vt. 338, 33 Am. Dec. 205; *Myers v. Hodges*, 2 Watts 381, 27 Am. Dec. 319; *Cunningham v. Cunningham*, 18 B. Mon. 19, 68 Am. Dec. 718; *Wilson v. Lineberger*, 94 N. C. 641, 55 Am. Rep. 628; *Brown v. First Nat. Bank*, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; *Drexler v. Tyrrell*, 15 Nev. 114; *Atcheson v. Mallon*, 43 N. Y. 147, 3 Am. Rep. 678; *West v. Camden*, 135 U. S. 507, 10 Sup. Ct. 838; *Brooks v. Cooper*, 50 N. J. Eq. 761, 26 Atl. 978, 35 Am. St. 793, 21 L. R. A. 617; *Baskett v. Moss*, 115 N. C. 448, 44 Am. St. 463, 48 L. R. A. 842.

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Graves & Graves, for respondent. The contract was not within the statute of frauds as it was not a contract to do anything. *President etc. Turnpike Co. v. Shafer*, 68 N. Y. Supp. 5. The question is not what is the probable duration of the contract, but whether it is required that it should not be performed within the year. *Warner v. Texas & P. R. Co.*, 164 U. S. 418. If the contract is void, the courts will extend aid to neither party. *St. Louis, V. etc. Co. v. Terra Haute R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953; *Pullman's Palace Car Co. v. Central Transp. Co.* 171 U. S. 138, 18 Sup. Ct. 808.

DUNBAR, J.—This is an appeal from an order of the court denying the petition of the administrator to require respondent to give an accounting of all the moneys, goods, chattels, accounts, and papers belonging to the estate of deceased, which had come into respondent's possession, it is alleged, in trust for the petitioner, and of respondent's proceedings thereon, and that the respondent be compelled to deliver the same to the petitioner.

Prior to February 23, 1896, Marshall Field and Nannie D. Field were husband and wife, and were citizens and residents of the state of Illinois. During the existence of this community they had acquired as community property several thousand acres of land in Spokane and Whitman counties in this state. A portion of this land had been sold under time contracts, the payments upon which had not been completed, and which were subject to the equities of the purchasers and to their right to conveyances when they had fully paid therefor. The unsold lands were farming lands which were occupied and farmed by tenants under leases which required the rents to be paid in cash or produce. February 23, 1896, Nannie D. Field died intestate, leaving as her heirs her husband, Marshall

Field, and two children. Thereafter, and prior to the commencement of the probate proceedings herein, Marshall Field acquired the interest of the children in the Washington lands, and became the sole heir to the property of the estate. The respondent, Coey, had been Mr. Field's agent for attending to his farming business for several years, and was continued in charge thereof the same as before Mrs. Field's death.

In order to avoid any question as to the legality of Field's title, Mr. Belden, a Spokane lawyer, was instructed to institute administration proceedings for the purpose of clearing the record title, by procuring an adjudication that the estate was not indebted, and that Mr. Field was the only person having an interest in the property. The appellant, who was then a clerk in Mr. Belden's office, was, upon the recommendation of Mr. Belden, nominated by Mr. Field to be administrator of said estate, and he was appointed to that position. Prior to the appointment, Mr. Field stipulated with the appellant that the administration proceedings should not interfere with respondent's management of the property nominally affected by it, but that his appointment should be a merely formal matter.

It had been the duty of Mr. Coey, under his agency, to collect the rentals and purchase-payments, etc., and to make his returns directly to Mr. Field. This mode of conducting the business of the estate was carried on for some months until after Mr. Moore had left the employment of Mr. Belden, when Mr. Moore, through his attorneys, requested Mr. Coey to make return to him of his management of the estate, which Mr. Coey refused to do, but continued to make returns to Mr. Field, as theretofore, refusing to turn over to the administrator the moneys received by him from the proceeds of the property belonging to the estate. Thereupon Moore petitioned the court to compel Coey to account to

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him. The petition was filed on March 14, and citation was issued and served upon Mr. Coey.

On March 19 a petition on behalf of Marshall Field was also filed, praying for the removal of Mr. Moore as administrator; this petition alleging the acquisition by Mr. Field of the entire interest in the estate, the experience of Mr. Coey as the managing agent of the lands for Mr. Field, the inexperience of Mr. Moore in such matters; and, further, that Moore was nominated as administrator because of an agreement between him and Mr. Belden, acting as Mr. Field's agent, that Mr. Moore should conduct the purely formal affairs of the administration under the advice and direction of Mr. Belden, and not otherwise; that he was to be governed entirely by the advice and direction of Belden, and that the business was to be done through him only nominally, and that all of the business of said lands should be conducted by Coey as theretofore, and all remittances made directly to Mr. Field; that Moore was not, by said agreement, to be required to exercise any care or control over the property, and that everything was to be left to the judgment of the petitioner and his representative, Coey; that, for his nominal performance of the duties of administration, Moore was to receive as full compensation \$250, which should be in lieu of all fees which he would otherwise be entitled to claim under the statutes. The petition further alleged that Mr. Field had given to Moore a bond in the sum of \$20,000 to indemnify him and save him harmless from all demands arising out of the business being conducted in the manner specified in the agreement; that Moore entered upon the discharge of his duties under such agreement, and conformed to the conditions of the agreement until after he had left the employment of Belden, when he proceeded to employ other counsel, and

attempted to charge the estate with the payment of their fees.

Many other things are set up in the petition, but those we have mentioned are sufficient for the purposes of the case. On the filing of this petition a citation was issued, directed to Mr. Moore, requiring him to appear and show cause why he should not be removed as prayed. On the return day of this citation the court ordered that the hearing upon this petition and the hearing upon the petition to compel an accounting of Mr. Coey be heard together as one matter. A demurrer to the petition of Mr. Field was interposed and overruled. The administrator thereupon filed his answer, denying the making of any contract alleged with reference either to the management of the estate or his fees, and all charges of wrongful conduct upon his part. The respondent, Coey, served and filed his answer, which set forth substantially the facts that we have mentioned. Findings of fact and conclusions of law were proposed by the appellant, which were refused by the court.

The court found, in substance, the following facts: That Mr. Field was not informed of the community property laws of the state of Washington, and did not know of the necessity for administration to settle his deceased wife's interest in the property, until in the spring of 1901, when, through his Chicago lawyers, Mr. Belden, a Spokane lawyer, was instructed to take all necessary steps to make good title to the farming lands in this state; that the administration was intended to be purely formal for the purpose of making title; that there were no debts, and that all interest in the realty had previously been conveyed to Mr. Field; that at the time the administrator, Mr. Moore, was appointed, he was a clerk in the

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employ of Mr. Belden; that the fact that there were no debts, and that Mr. Field had the entire interest in the property, and that the administration was to be purely formal, was understood by all the parties; that Mr. Coey had been for several years attending to the business of Mr. Field, collecting rents and payments, marketing grain, etc., and remitting to Mr. Field, for which he was paid a commission on an agreed scale; that the farming interests in Mr. Coey's hands were large and complicated, and required a great deal of labor and oversight on the part of Mr. Coey, and special knowledge of the conditions and of the business of farming in Eastern Washington; that these facts were understood by Mr. Belden and his clerk, Mr. Moore; that it was desired that Mr. Coey should continue the business as theretofore; that, after the consideration of certain other legal questions, it was determined to appoint Mr. Moore administrator, it being understood by all the parties that his work would be purely formal, and accepted by him with that understanding, and that it was agreed that he would waive the statutory fees of administration in consideration of that fact. The court could not find that he agreed to accept \$250, but did find that he waived the statutory fees, and could receive only such sum as was reasonable for the services actually rendered; that the whole matter was placed in the hands of Mr. Belden, and that the appointment of Mr. Moore was made so that the formal business of administration might be more conveniently done in his office; that it was agreed that, in view of the fact that there would be a departure from the formal course of administration by reason of Mr. Coey's remitting directly to Mr. Field, Mr. Field should give an undertaking to Mr. Moore to hold him harmless; that this undertaking was subsequently exe-

cuted, sent to Mr. Belden, accepted by Mr. Moore, and its contents known and approved by him; that thereafter Mr. Moore paid no attention whatever to the business of the estate, but it was entirely conducted by Mr. Coey without any oversight on the part of Mr. Moore or any direction from him, no services except the mere lending of his name having been performed by Mr. Moore; that in February Mr. Moore left the employment of Mr. Belden, and shortly thereafter began to insist that he should make his semi-annual report to the court; that Mr. Coey brought the vouchers and figures necessary for that purpose to Mr. Belden's office, Mr. Moore being present, and left them with the understanding that Mr. Belden would prepare a report; that the next day, for some reason not apparent in the evidence, Mr. Moore employed other counsel, and demanded these papers and vouchers from Mr. Belden; that it was the purpose of all the parties that the business should be conducted by Mr. Coey, and that Mr. Moore should not handle any of the moneys or any of the grain, or manage the farming affairs; that he was appointed with that express understanding; that he would not have been appointed but for that understanding; neither was it intended that Mr. Coey should be his agent in any other than a formal sense, nor did Mr. Coey ever become his agent, or employee, but, on the contrary, continued as agent of Mr. Field, and no contention to the contrary of this was ever made by Mr. Moore until after he left Mr. Belden's employ, when the controversy between the parties arose; that the penalty of Moore's bond was less by a number of thousand dollars than the annual rentals and collections from the realty.

The conclusions of law were that Moore was entitled to charge only such fees as the services theretofore actu-

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ally rendered were reasonably worth, and that his waiver of the statutory fees was enforceable and valid; that there was no necessity for the employment of additional counsel, and that compensation ought not to be allowed them out of the funds of the estate; that the contract in respect to the handling of the business was valid, there appearing no other personal interest in it except Mr. Field's, and that it should be enforced; that the citations issued against Mr. Coey should, therefore, be discharged. The court refused, however, to discharge Mr. Moore, but required him to conduct the business in accordance with the contract under which he was appointed. In pursuance of these findings it was ordered that the citation against Moore be discharged and the petition to remove Mr. Moore be dismissed, and that he be directed to continue the administration of the estate in accordance with law and the facts found by the court. From so much of this order as discharged the citation directed to Mr. Coey, and required the administrator to administer the estate in accordance with the alleged contract, by which he was to be administrator in name only, the administrator appeals.

Those assignments of error which relate to the improper admission of evidence we will not discuss, for, it being the duty of this court to try the case, in its consideration the court will pass upon such testimony only as it deems admissible under the law. We have examined the record, and from such examination are not disposed to disturb the court's findings of fact. So that the only question for consideration is whether such findings justify the conclusions of law. We think under the testimony, that Mr. Field was the only real party in interest; that, for the purpose of settling the title to the real estate—a matter which was of no importance to any one but himself,

and which he might have proceeded with or not according to his own option and best judgment—he had a right to enter into the contract which he did enter into with Moore, in relation to the formal duties of the administrator and the fees which he was to receive; in other words, that he had a right to make a special contract with relation to payment for Moore's services before he would agree to recommend him for an appointment as administrator. He might have entertained the view that such administration was really not necessary, and have invoked it simply out of an abundance of caution—a proceeding which he would not institute, if it would cost him for services of the administrator the amount specified by the statute, and the peril to the business incident to placing its management in the hands of an inexperienced person, or person other than the one whom he had for years employed.

But it is alleged by the appellant that the contract is void under the statute of frauds, which requires a memorandum in writing of any agreement which is not to be performed within the period of one year from the making thereof; and it is insisted that under the law this estate could not be settled within the period of a year, for the reason that creditors were entitled to a year's time from date of notice given by the administrator in which to present their claims against the estate. It is, however, strenuously insisted by the respondent that the arrangement which was entered into was not a contract or agreement within the provisions of the statute of frauds; that, under the provisions of our statute, Mr. Field being the only heir to the estate, and there being no debts owing by the estate, he was the only person interested in any way in the estate, and the only one who had a right to petition for the appointment of an administrator; that

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it was only for the purpose of clearing the title to real estate that the administration in his interest was necessary; that he had a right, before recommending an administrator, to stipulate that such administrator should waive the rights of possession and fees which he was entitled to under the statute, and that the agreement entered into with the administrator was, in substance, only an abandonment by the appellant of a right he might have insisted upon; that there was no specific thing that was done within a year, or in any other time. It seems to us that there is some merit in this contention; that time was not an essential element of the contract, but that the essential element was the waiving of certain rights.

In *President etc. of the Great Western Turnpike Co. v. Shafer*, 68 N. Y. Supp. 5, an action was brought to collect toll for passage through plaintiff's toll gate. The defendant claimed that about forty years before an oral agreement was made between one Buell, owner of a life interest in the farm, and the plaintiff, whereby Buell was to close up a private road, and as a consideration he and the tenants of the Buell farm should for all time be exempt from the burden of toll; that he closed the road, and kept it closed; and that under such agreement he had been allowed to use the road without the payment of toll. It was contended by the plaintiff that the contract pleaded was illegal under the provisions of the statute of frauds, in that it was an oral agreement not to be performed within one year. It was held that the statute did not apply, the court saying:

"As to the other claim, that it was an agreement not to be performed within a year, and therefore void, there seems to me to be very little to sustain it, and what argument there may be is specious. It was not an agreement to do anything. If plaintiff had agreed to carry the

plaintiff [Buell] for a number of years, or had agreed to do any continuous labor for years, or to maintain its turnpike for years, a ground for argument would be apparent. No time here is fixed. The plaintiff might abolish its gate within a year, but time was not involved. The agreement at once and forever eliminated a burden. It made an end of it then. There was no future for it—no year or succession of years. The plaintiff sold its power to vex the occupants of the farm, and that was all there was of it.”

The same reasoning might be aptly applied here. To obtain the privilege of acting as administrator for a reasonable compensation—a privilege which he could obtain only with the consent of Field—the appellant waived certain rights and privileges which are in no way connected with or associated with time.

It is also contended by the respondent that the contract, though oral, is not void because there is no express stipulation that the appellant should refrain from doing the things which he agreed not to do; that matters might have taken such a course that, as between the parties to the contract, the contract would have been fully performed within a shorter period; that the appellant might have died or resigned or have been removed. It has been well established by authority that the test is not what the parties expected the duration of the contract would be, but whether of necessity it must be of such duration.

A very instructive and exhaustive case on this subject is *Warner v. Texas & P. R. Co.*, 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495, where the authorities are reviewed at length by Mr. Justice GRAY, and it was held that the clause of the statute of frauds which requires a memorandum in writing of any agreement which is not to be performed within one year from the making thereof, applies only to an agreement which, according to the in-

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tention of the parties, as shown by the terms of their contract, cannot be fully performed within a year; and not to an agreement which may be fully performed within a year although the time of performance is uncertain, and may probably extend, and may have been expected by the parties to extend, and does in fact extend, beyond the year. In that case the action was brought by Warner in 1892, upon a contract made in 1874, by which it was agreed between the parties that, if the plaintiff would grade the grounds for a switch, and put on the ties, the defendant would put down the rails and maintain the switch for the plaintiff's benefit for shipping purposes as long as he needed it. The defendant pleaded that the contract was oral, and within the statute of frauds, because it was not to be performed within one year from the making thereof, and because it was a grant or conveyance of an estate of inheritance, and for a term of more than one year, in lands. In deciding that case the court cited with approval *Peters v. Westborough*, 19 Pick. 364, 31 Am. Dec. 142, where an agreement to support a girl twelve years old until she was eighteen was held not to be within the statute on the ground that the stipulation or understanding to bring it within the statute must be absolute and certain, and not susceptible of dependence upon any contingency; the court stating that the performance of the plaintiff's agreement with the child's father depended on the contingency of her life.

"If," said the court, "she had continued in the plaintiff's service, and he had supported her, and she had died within a year after the making of the agreement, it would have been fully performed. And an agreement by parol is not within the statute, when by the happening of any contingency it might be performed within a year."

Also, *Blanding v. Sargent*, 33 N. H. 239, 66 Am. Dec. 720, where it was held that if, by its terms, or by reasonable construction, the contract can be fully performed within a year, although it can be done only by the occurrence of some contingency by no means likely to happen, such as the death of some person referred to in the contract, the statute has no application, and no writing is necessary; and therefore that an agreement by a physician to sell out to another physician his business in a certain town, and to do no more business there in consideration of a certain sum to be paid in five years, was not within the statute, because, if the defendant had died within a year from the making of the contract, having kept his agreement while he lived, his contract would have been fully performed.

And *Thouvenin v. Lea*, 26 Tex. 612, where the court said:

"An agreement which may or may not be performed within a year is not required by the statute of frauds to be in writing; it must appear from the agreement itself that it is not to be performed within a year."

And *Weatherford etc. Ry. v. Wood*, 88 Tex. 191, 30 S. W. 859, 28 L. R. A. 526, where the court said:

"It seems to be well settled, that where there is a contingency, expressed upon the face of the contract or implied from the circumstances, upon the happening of which within a year the contract or agreement will be performed, the contract is not within the statute, though it be clear that it cannot be performed within a year except in the event the contingency happens. . . . The existence of the contingency in this class of cases, and not the fact that the parties may or may not have contemplated its happening, is what prevents the agreement from coming within the scope of the statute."

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The agreement in that case was that the railroad company should issue annually to one Wood a pass over its road for himself and his family, and should stop its trains at his house for ten years.

"Applying these principles," said the court, "to the case under consideration, we think it clear that the contract above set out was not within the statute. The agreement to give the pass and stop the trains was personal to Wood and family. He could not transfer it. In case of his death within the year the obligation of the company to him would have been performed, and no right thereunder would have passed to his heirs or executors. If it be held that each member of his family had an interest in the agreement, the same result would have followed the death of such member, or all of them, within the year. . . . The happening of the contingency of the death of himself and family within a year would have performed the contract in one case as certainly as in the other."

The court in the case of *Warner v. Texas & Pacific Ry. Co.*, *supra*, said:

"If, within a year after the making of the contract, the plaintiff had died, or had abandoned his whole business at this place, or for any other reason had ceased to need the switch for the shipping of lumber, the railroad company would have been no longer under any obligation to maintain the switch, and the contract would have been brought to an end by having been fully performed."

It seems to us, after an investigation of all available authority on the subject, that the contract in this case was not the agreement or contract contemplated by the statute of frauds, as were contracts where the parties contracted to do or not to do certain things within a certain time.

But, whatever may be the authority on this branch of

the case, there is another and more potent reason why the appellant should not be allowed to plead this statute in his behalf, and that reason is founded on the doctrine of estoppel. Courts will not allow themselves to be used for the purpose of conferring benefits upon litigants who plead the illegality of a contract into which they entered, when there has been a part performance of the contract, and when the relative positions of the contracting parties have been changed by reason of the contract and its part performance. In accordance with this principle, an oral contract for the sale of real estate which falls within the statute of frauds can yet be enforced if there has been a part performance or execution of the contract. The same principle is applicable here. The agreement was carried into effect, and the appellant accepted the office and qualified in accordance with the terms of the contract, and there is no principle of law or equity that would permit him to plead the statute of frauds to escape the liability of a contract, the benefits of which he still asks to enjoy. For it will be noted that he is not seeking to avoid the contract so far as the acceptance of the office under the contract is concerned, but he desires to maintain the benefits of the contract under which he obtained the office, and assail it in relation to the compensation of the office; thereby maintaining all the benefits, while escaping all the liabilities, of what he alleges was an illegal contract. He agreed not to accept the statutory fees, and not to take possession of the estate, and he will not be permitted to do what he agreed not to do, while practically receiving the benefits of the agreement of the other party to the contract. This is not an action by Field to enforce this alleged illegal contract, but it is an action by the appellant to obtain the emoluments of an office

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which he says was obtained by him by virtue of an illegal contract to which he was a party.

This conclusion renders unnecessary a discussion of the other points raised in the briefs.

The judgment is affirmed.

FULLETON, C. J., and MOUNT, HADLEY, and ANDERS, JJ., concur.

[No. 4567. Decided September 28, 1903.]

*In the Matter of the Estate of OLIVER P. BARKER,
Deceased.*

EDGAR L. BARKER *et al.*, Appellants, v. MOLLIE F. HUEY,
*Executrix, et al., Respondents.*¹

JUDGMENTS—ORDER CONSTRUING WILL—VACATION—APPEAL—APPEALABLE ORDERS. Where, upon application for the sale of certain real estate to pay debts of the estate, the parties appear and contest the matter, and the court finds that under the terms of the will certain other real estate is specifically charged with the payment of the debts, the order denying the petition can not be vacated for error of law, since it is final as a construction of the will and appealable, and subject to vacation only by the statutory steps.

Appeal by Edgar L. Barker *et al.*, heirs at law of Oliver P. Barker, deceased, from an *ex parte* order of the superior court for King county, Tallman, J., entered October 7, 1902, vacating an order made June 13, 1902, denying a petition to sell real estate to pay debts. Reversed.

Roberts & Leehey and *George B. Cole*, for appellants.

Richard Osborn, for respondent Mollie F. Huey.

¹Reported in 73 Pac. 796.

Henry F. McClure, guardian *ad litem*, for respondent Melba Washburn.

DUNBAR, J.—Oliver P. Barker died September 3, 1901, leaving the following will:

“Providence Hospital.

“I, O. P. Barker, in sound mind and memory leave in case of my death Hotel Barker 1205 First Avenue, Seattle, Washington, to Miss Mollie Huey and Mrs. Nora Huey, both of Seattle, to have and to hold and run and receive all proceeds arising from the same for three years. At the expiration of that time it is my wish that the foresaid lease and furniture in said Hotel Barker be sold and one-half of the proceeds thereof be set aside for the sole use of Malba Washburn, a minor, residing at 1822, 7th Avenue, Seattle, the balance to be divided share and share alike to my brother and sister Edgar L. Barker and Clara Marie Lolmaugh, the former residing at Oswego, Kansas, and the latter at Redlands, California. It is my desire that all my debts be paid out of the property aforesaid, personal and real. That Mollie Huey be my executrix without bonds and dispense with probating of this will.

“Witness

(Signed) O. P. Barker.”

“P. B. M. Miller.

“J. Wotherspoon.”

On September 9, 1901, Mollie F. Huey was appointed executrix, and on March 29, 1902, filed her petition for the sale of real estate. On the 16th of May, the matter came on for hearing upon the petition to sell real estate to pay the debts and costs of administration, the petition asking for the sale of real estate other than that described in the will. The court found that the property devised by the will had been specifically charged with the payment of the debts of the deceased, and that the real estate undevise could not be sold to pay the debts, and denied the petition.

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This decree was formally entered on June 13, 1902. There was a recital in the decree that a further application might be made for a sale of real estate for the purpose of paying the costs and expenses of administration, and the case was continued for that purpose until June 20, 1902, when it was further continued until October 7, 1902, at which time the court made an order vacating and setting aside the former decree, made on May 16, 1902, and entered on June 13, 1902, which order directed the sale of the real estate to pay the debts of said estate, as well as the costs and expenses of administration; and from that decree this appeal is taken. No written petition, motion, or application was made requesting the vacation of the former judgment, and, so far as we have been able to ascertain, none of the statutory grounds for the vacation of the same were stated; but it was evidently vacated for the reason that the court changed its mind in regard to the correctness of the former judgment.

No appeal was prosecuted from the judgment of May 16, entered June 13, 1902, and it is the contention of the appellants that the court had lost jurisdiction of the decree, and had no authority to vacate the same, excepting in the way pointed out by the statute for the vacation of judgments; citing, in support of such contention, *Hancock v. Stewart*, 1 Wash. T. 323; *Whidby Land etc. Co. v. Nye*, 5 Wash. 301, 31 Pac. 752; *Tacoma L. & M. Co. v. Wolff*, 7 Wash. 478, 35 Pac. 115, 755; *Dickson v. Matheson*, 12 Wash. 196, 40 Pac. 725; *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363; *State ex rel. Grady v. Lockhart*, 18 Wash. 531, 52 Pac. 315; *Friedman v. Manley*, 21 Wash. 675, 59 Pac. 490; *Roberts v. Shelton Southwestern R. R. Co.*, 21 Wash. 427, 58 Pac. 576; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182;

Spokane & I. Lumber Co. v. Stanley, 25 Wash. 653, 66 Pac. 92. It is the contention of the respondents, however, that the alleged decree of the court was not a judgment such as is contemplated by the law, where it provides a method for the vacation of a judgment, but that it was simply an interlocutory order, which could not have been appealed from, and that the court, therefore, had a right to change or correct such order at any time before final judgment; so that the pertinent question is whether or not the judgment entered by the court was a final judgment, from which an appeal would lie. If it was, we think the cases cited by the appellant are pertinent, and the judgment complained of should be reversed.

The record shows that, on the 16th day of May, this cause came regularly on to be heard on the petition of the executrix for the sale of real estate for the payment of the debts of the estate. It also shows, that a *bona fide* and earnest contest was entered into by Clara Marie Lolmaugh and Edgar L. Barker, sister and brother of the deceased, appellants here, and by Melba Washburn, a minor, by her guardian *ad litem*, all represented by earnest and eminent counsel, and that formal objection was raised to the selling of the real estate of said estate by the appellants herein; that a demurrer was interposed to these said objections by the respondents herein; that the court considered arguments thereon, both oral and written, and entered a formal and solemn decree. The decree was not, as we view the record, the disposition of an interlocutory matter, but the matter under adjudication was the construction of the will, and was the final determination of the rights of the parties to this action under the will, as much a decree flowing from the construction of the will as the present decree is, and as susceptible of

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Syllabus.

appeal. No appeal having been taken from this judgment, and the statutory steps not having been instituted for its vacation, under the rule announced in *Burnham v. Spokane Mercantile Co.*, 18 Wash. 207, 51 Pac. 363, and *Coyle v. Seattle Electric Co.*, 31 Wash. 181, 71 Pac. 733, where *Burnham v. Spokane Mercantile Co.*, *supra* was reviewed and followed, the court erred in vacating it.

This conclusion renders unnecessary a consideration of the second assignment of error, which embraces the construction of the will. The judgment is reversed.

HADLEY, MOUNT, and ANDERS, JJ., concur.

FULLERTON, C. J.—I concur for the reasons stated in the opinion of the court, but do not wish to be understood as indorsing the case of *Coyle v. Seattle Electric Co.*, or *Burnham v. Spokane Mercantile Co.*, as construed in the *Coyle Case*.

[No. 4713. Decided September 29, 1903.]

A. E. RUSSELL, *Respondent*, v. CHARLES F. GAY *et al.*,
Appellants.¹

EJECTMENT—AFFIRMATIVE DEFENSE—SUFFICIENCY OF EVIDENCE.
In an action of ejectment where defendants set up as an affirmative defense that they were in possession under a contract to purchase from the plaintiff, the plaintiff makes out a *prima facie* case by showing that the defendants were originally in possession under a contract to purchase from a third party, borrowed money to make improvements, and were in default, and assigned their contract to the plaintiff, who purchased the property from the third party to protect the advances made, and that defendants failed to consummate an agreement to repurchase the property

¹Reported in 73 Pac. 795.

from plaintiff; and defendants failing to establish their affirmative defense by a preponderance of the testimony, findings for the plaintiff will be sustained.

TRIAL—ORDER OF PROOF—APPEAL—HARMLESS ERROR. The refusal of the court to permit a witness to answer certain questions is not reversible error in a cause tried without a jury, where the witness was afterwards permitted to fully answer the same.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 21, 1903, upon findings in favor of plaintiff, after a trial on the merits before the court without a jury. Affirmed.

L. H. Prather, for appellants.

Post, Avery & Higgins, for respondent.

FULLERTON, C. J.—This action was begun as an action in ejectment. The respondent, who was plaintiff below, alleged that he was the owner in fee, and entitled to the possession, of certain real property situated in the city of Spokane; that the appellants were wrongfully in possession of the same, and wrongfully and unlawfully withheld such possession from him, to his damage in the sum of \$350. The appellants answered, admitting the respondent's title to the property; that they were in possession, and withheld such possession from the respondent; but denied that such possession or withholding of possession was wrongful or unlawful; and, by way of an affirmative defense, alleged that they were in possession under a contract of purchase, entered into between themselves and respondent, by the terms of which they were entitled to possession, and which contract they were then, and at all times had been, ready and willing to perform. For reply the respondent denied the new matter in the answer, and,

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on the issues thus made, a trial was had before the court, resulting in a finding and judgment for the respondent.

The questions suggested by the assignments of error are almost wholly questions of fact. It appears that in January, 1900, at a time when the property was vacant, the appellants contracted to purchase the same from one Clark for \$350, paying \$50 down on the same and agreeing to pay \$100 more on or before the 1st day of May, 1900, and the balance (\$200) on or before the 1st day of May, 1901. Before the contract became delinquent, the appellants commenced the erection of a house on the land, and borrowed considerable sums of the respondent's father, which were used in the construction of the house. These sums, so the father testifies, were loaned under a promise of repayment on short time; the appellants representing that they had resources from which the money could be obtained. Later on, they informed him that the money would not be forthcoming from the expected source, whereupon the respondent, to protect these advancements, took an assignment from the appellants of the Clark contract, paid the balance due on the purchase price, and took a deed to the property, advancing some \$1,800 or \$1,900 in the transaction. It further appears that there was some sort of an understanding between the parties to the effect that the appellants were to have an opportunity to repurchase the property on the installment plan. The appellant Charles F. Gay testified that an oral contract of that purport was entered into, but was unable to give any very definite recital of what its terms and conditions were. On the other hand, both the respondent and his father say that no such contract was entered into. They say, however, that one was talked over, and that they went so far

as to reduce it to writing, a draft of which is in the record, but say that the appellants refused to execute that, or any other contract of like import, and that in fact no contract for the purchase of the premises by the appellants, or either of them, had ever been entered into. As the respondent made a *prima facie* case on his right to recover, he was entitled to prevail, unless the appellants made out their affirmative defense by a preponderance of the evidence. This, it seems to us, they wholly failed to do, and, as this is in accord with the findings of the trial court, its findings will not be disturbed.

Complaint is made that the court erred in refusing to permit the witness Gay to answer certain questions propounded him by his counsel "direct in defense." As a perusal of the record, however, shows that the witness was afterwards permitted to answer fully the questions objected to, and that his answers thereto are now in the record, we cannot think it reversible error to have rejected them at the time complained of, even conceding that they were then admissible. The trial was before the court without a jury. In such a case, the order in which the evidence is presented can never be so material as to require the cause to be sent back for further evidence.

The judgment is affirmed.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

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Citations of Counsel.

[No. 4675. Decided September 29, 1903.]

ROY E. WEISER, *Appellant*, v. DAVE HOLZMAN *et al.*,
Respondents.¹

83	87
84	583

APPEAL—BOND—JUSTIFICATION OF SURETIES—OBJECTIONS NOT URGED BELOW. An objection to an appeal bond that the sureties did not justify as to "property within this state" is one going to the sufficiency of the sureties, and must be first raised in the court below.

NEGLECT—SALE OF EXPLOSIVE—PLEADING—SUFFICIENCY OF COMPLAINT—DEFINITENESS. A complaint alleging negligence in the manufacture and bottling of a dangerous explosive called champagne cider by failing to observe the proper temperature, amount of gas, and strength of the bottles, and failing to attach labels or give notice of the danger, is not demurrable as being so indefinite as to be meaningless, but the remedy is by motion to make more definite and certain.

SAME—LIABILITY TO STRANGERS—CONNECTION BETWEEN NEGLIGENCE AND INJURY. One who knowingly delivers a dangerous explosive without giving notice to the purchaser of its intrinsic danger, is liable to any person who is, without fault, injured thereby, without reference to any privity of contract, and a complaint by a stranger is not demurrable on the ground that no causal connection between the negligence and the injury is shown.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered January 5, 1903, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries caused by an explosion of a bottle of "champagne cider" manufactured by defendant. Reversed.

Roche & Onstine, for appellant.

Post, Avery & Higgins, for respondents. The mere allegation of an explosion of a bottle of champagne cider does not bring the case within the rule applicable to high explosives. *Bragdon v. Perkins-Campbell Co.*, 87 Fed.

¹Reported in 73 Pac. 797.

109; *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 27 L. R. A. 583; *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. 244, 12 L. R. A. 322; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *Loop v. Litchfield*, 42 N. Y. 351; *National Savings Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621; *State ex rel. Travelers' Ins. Co. v. Harris*, 89 Ind. 363; *Glaser v. Seitz*, 71 N. Y. Supp. 942; *Walker v. Chicago, R. I. & P. Ry. Co.*, 71 Iowa 658, 33 N. W. 224; *Huff v. Austin*, 46 Ohio St. 386, 21 N. E. 864; *Gibson v. Torbet*, 115 Iowa 163, 88 N. W. 443, 56 L. R. A. 98; *Voigt v. Michigan Peninsular Car Co.*, 112 Mich. 504, 70 N. W. 1103.

FULLERTON, C. J.—The appellant sued for personal injuries. A general demurrer was interposed and sustained to his complaint, whereupon he refused to plead further, and a judgment that he take nothing by his action was entered against him, from which he appeals to this court.

The respondents move to dismiss the appeal for the reason that the justification of the sureties on the appeal bond fails to recite that the sureties are worth the amount for which they justify "in property within this state," as required by § 6509 of the Code (Ballinger's). In other respects the bond is regular. While it may be difficult to distinguish this omission from others made in appeal bonds, which were deemed fatal to the appeal by this court, we have uniformly held this one not to be so, but that an objection on this ground is one going to the sufficiency of the sureties, which must be raised and passed upon in the court below in order to be available in this court. *McEachern v. Brackett*, 8 Wash. 652, 658, 36 Pac. 690, 40 Am. St. 922; *Warburton v. Ralph*, 9 Wash. 537, 546, 38 Pac. 140; *Horton v. Donohoe Kelly Banking Co.*, 15 Wash. 399, 46 Pac. 409, 47 Pac. 435. As

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the objection in this case was not so raised, the motion to dismiss must be denied.

The next question is, does the complaint state facts sufficient to constitute a cause of action? Stripped of its verbiage, the complaint alleges, that the respondents manufactured, sold, and delivered to one Pratt, under the name of "champagne cider," a dangerous explosive, knowing it to be such, without warning Pratt of its dangerous character, or placing on the bottle containing the substance anything to indicate that it was a dangerous explosive; and that the appellant while in the employ of Pratt, and engaged in his duties as such employee, and without fault or negligence on his part, was injured by an explosion of the substance. Paragraph 5 of the complaint was as follows:

"That the injuries to said plaintiff were caused by the willful negligence, carelessness and want of proper care on the part of the defendant, D. Holzman & Co., by reason of said defendant willfully, carelessly, and negligently, and for want of ordinary care in the manufacturing, bottling, preparing and selling of said champagne cider, in this, that the said defendants failed to manufacture, bottle and prepare the said champagne cider in the proper degree of temperature; failed to properly charge the said champagne cider with the proper amount of carbonic acid gas, and other substances used in the manufacturing and bottling of the same; failed to properly test said bottle as to its strength and endurance to hold said champagne cider; failed to properly label said bottle as to its being an explosive and dangerous substance; failed to explain to the said M. L. Pratt, or said plaintiff, or any one else, of the danger in handling and using said bottle of champagne cider, and the cause for, and probability of its exploding and injuring those who came in contact with the same."

The prayer was for damages in the sum of \$10,000.

The record does not advise us as to the ground upon which the trial judge sustained the demurrer, but the respondents urge against its sufficiency two principal contentions, the first of which is that the allegations of negligence are so indefinite as to be meaningless, and the second, that there is no causal connection between the negligence alleged (conceding the allegations sufficient) and the injury complained of. The argument that the allegations of negligence are so indefinite as to be meaningless is based upon recitals in the paragraph above quoted. It seems to us, however, that the complaint states a cause of action without that paragraph, and hence it is not very material to inquire just how definite this particular one should have been made; but, conceding it otherwise, we do not think the allegations susceptible to a general demurrer. Clearly, the acts recited therein, when taken with the other acts recited in the complaint, constitute actionable negligence, and, if more particularity of statement was desired and could be required, the remedy was by a motion to make more definite and certain; not by a general demurrer.

The second objection seems to us to be equally without merit. One who sells and delivers to another an article intrinsically dangerous to human life or health, such as a poison, an explosive, or the like, knowing it to be such, without notice to the purchaser that it is intrinsically dangerous, is responsible to any person who is, without fault on his part, injured thereby. The rule does not rest upon any principle of contract, or contractual relation existing between the person delivering the article and the person injured, for there is no contract or contractual relation between them. It rests on the principle that the original act of delivering the article is wrongful, and that every one is

responsible for the natural consequences of his wrongful acts. The rule that liability exists in such cases is abundantly supported by authority. In *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455, it was held that a manufacturer of drugs, who had sold a druggist extract of belladonna under the label "extract of dandelion," was liable to a person injured thereby, who had procured it of the druggist on a physician's prescription calling for extract of dandelion, it appearing that neither the druggist nor the person taking it knew that it was other than it was labeled. In *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298, it was held that an apothecary, who had negligently sold a deadly poison for a harmless medicine called for, was liable for the death of the purchaser's servant to whom it was administered, at the suit of the servant's administrator. In *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64, the principle governing the liability was stated in the following language:

"It is well settled that a man who delivers an article, which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does, in fact, result therefrom, to that person or any other who is not himself in fault."

So, in *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 31 L. R. A. 220, 52 Am. St. 146, it was said:

"We agree that the action cannot be sustained on the ground of any privity of contract between plaintiff and defendants, for there was none. If a tradesman sells or furnishes for use an article actually unsound and dangerous, but which he believes to be safe and warrants accordingly, he is not liable for injuries resulting from its defective or unsafe condition to a person who was neither a party to the contract with him, nor one for whose benefit the contract was made. . . . But when the seller, as

in the case made by the complaint before us, represents the article to be safe for the uses it was designed to serve, when he knows it to be dangerous because of concealed defects, he commits a wrong independent of his contract, and brings himself within the operation of a principle of the law of torts."

See, also *Shearman & Redfield, Negligence* (5th ed.), § 117; *Blood Balm Co. v. Cooper*, 83 Ga. 457, 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. 324; *Schubert v. J. R. Clark Co.*, 49 Minn. 331, 51 N. W. 1103, 15 L. R. A. 818, 32 Am. St. 559; *Bishop v. Weber*, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; *Elkins v. McKean*, 79 Pa. St. 493; 12 Am. & Eng. Enc. Law (2d ed.) 508, subd. 6.

The judgment appealed from is reversed, and the cause remanded, with instruction to overrule the demurrer.

HADLEY, ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4486. Decided October 1, 1903.]

GEORGE F. KETCHUM, *Respondent*, v. STETSON & POST MILL COMPANY, *Appellant*.¹

SALES—VALIDITY—GOODS NOT IN ESSE. The objection that a sale of logs is void because they were not in existence at the time the sale was made, can not be urged by the purchaser after the contract is fully executed except as to paying the purchase price.

SALES—AGREED PRICE—STATEMENT OF ACCOUNT—CONCLUSIVENESS. An agreed price for goods sold is sufficiently shown by the vendor, where the vendee made a statement of the account at the price contended for, and such statement is conclusive as to the items specified, notwithstanding a disputed counterclaim for damages.

SALES—IMPLIED WARRANTY—LATENT DEFECT—INJURY TO MILL BY. There is no implied warranty rendering the vendor of a

¹Reported in 73 Pac. 1127.

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Citations of Counsel.

boom of logs responsible for injuries to the vendee's mill by reason of a piece of iron imbedded in one of the logs, when the vendor was not the manufacturer and had no notice of the defect and the vendee inspected the logs before running them through his mill.

Appeal from a judgment of the superior court for King county, Bell, J., entered April 7, 1902, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court. Affirmed.

J. W. Rayburn, for appellant. An agreement to sell property not in existence is void. *Laughton v. Higgins*, 4 H. & N. 402; *Mitchell v. Winslow*, 2 Story 630; *Dickey v. Waldo*, 97 Mich. 255, 56 N. W. 608, 23 L. R. A. 449; *Bibend v. Liverpool & L. F. Co.*, 30 Cal. 79; *Otis v. Sill*, 8 Barb. 102. There was an implied warranty that the logs were reasonably fit for the purpose intended. *Tacoma Coal Co. v. Bradley*, 2 Wash. 600; *Huntington v. Lombard*, 22 Wash. 202; *Ketchum v. Wells*, 19 Wis. 25; *Jones v. Just*, L. R., 3 Q. B. 197; *Morse v. Union etc. Co.*, 21 Ore. 289, 28 Pac. 2, 14 L. R. A. 157; *Dushane v. Benedict*, 120 U. S. 630, 7 Sup. Ct. 696; *French v. Vining*, 102 Mass. 132; *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476. It is not necessary to show that the vendor had knowledge of the defect. *Chandler v. Lopas*, 1 Smith's Lead. Cas. 344; *Shaw v. Smith*, 45 Kan. 334, 25 Pac. 886; *Hillman v. Wilcox*, 30 Me. 170; *Schuchardt v. Allens*, 1 Wall. 359. That one of two innocent parties should suffer whose acts occasioned the loss. *Barnard v. Campbell*, 55 N. Y. 456, 14 Am. Rep. 289; *Somers v. Brewer*, 2 Pick. 202.

W. H. Bogle and *R. S. Jones*, for respondents. The rule of *caveat emptor* applies. *Hight v. Bacon*, 126 Mass. 10, 30 Am. Rep. 639; *Barnard v. Kellogg*, 10 Wall. 383; *Dounce v. Dow*, 64 N. Y. 411.

PER CURIAM.—This was an action begun by respondent against the appellant to recover \$709.28, alleged to be the agreed purchase price of a boom of saw logs sold and delivered to the appellant by the respondent. The appellant, by its amended answer, put in issue all the material allegations of the complaint, and then pleaded at length several affirmative defenses; the principal one being a counterclaim for injuries to appellant's mill, in the sum of \$358.16, caused by a piece of iron which in some manner became imbedded in one of the logs composing the boom sold. There are other allegations, which will be noticed later on, but which require no special mention here. Respondent denied, generally and specially, all of the material allegations of the answer.

Prior to the trial, the appellant paid respondent \$351.12, under stipulation that such payment was made without prejudice to the rights of either party to the action. At the trial in the superior court, after hearing the evidence on both sides, the court directed the jury to find a verdict in favor of respondent for \$358.16, with interest, the whole amounting to \$373.36. Appellant made and filed a motion for a new trial, which was overruled, exception taken, and judgment rendered on the verdict, from which defendant, Stetson & Post Mill Company, appeals.

The first point made by the appellant is that prior to March 15, 1901, the date of the delivery and receipt of the logs in question, at the time when the first negotiations were had between respondent and one Judy, who cut and furnished the logs, the property was not *in esse*, and therefore the sale is void. With such contention we cannot agree. Were the appellant attempting to enforce an executory contract for the sale of the logs, such an objection might be pertinent, but it has no place where the contract has been

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so far executed that nothing remains to be done except to pay the purchase price.

It is next said that the evidence did not show that the logs were sold for an agreed price, but that it showed only a contract to pay their reasonable value. But we think the appellant is again in error. Mr. Stetson, president of appellant company, when on the witness stand, testified in effect that the logs were sold for an agreed price; and the company, in a statement of account which it furnished the respondent, listed the logs at the price respondent contends was the agreed price. It is true the appellant's counsel argues that such statement is not binding, for the reason that the counter demand of \$358.16, representing damages sustained by appellant, was disputed by respondent, We think, however, that the statement, in the absence of proof of mistake, was conclusive evidence that the price of logs was agreed upon by the parties. In *Tuggle v. Minor*, 76 Cal. 100, 18 Pac. 132, it was said, "But it has been held that when all the items of an account are admitted to be correct, except particular ones which are left by the parties for future adjustment, the account becomes stated as to those items which are admitted to be correct;" citing *Wiggins v. Burkham*, 10 Wall. 129, 19 L. Ed. 884; 2 Greenleaf, Evidence, § 126; *Terry v. Sickles*, 13 Cal. 427.

The next point urged by the appellant is that there was an implied warranty as to the quality and soundness of the logs on the part of respondent, he knowing the purposes for which they were to be used by appellant when he entered into the contract of sale with it, and delivered to it the logs. The respondent, at the time of the delivery of the logs, was a merchant engaged in a general mercantile business at Stanwood, Snohomish county, which fact was known to appellant. The logs were towed to, and deliv-

ered at, the mill by one Dugan, the agent of respondent, where they were graded and scaled by him (Dugan) and accepted by appellant. Its inspector and agent carefully inspected the logs before running any of them through its mill. About four days after delivery, while appellant was engaged in sawing one of the logs into lumber, its saws struck a piece of iron imbedded in its side, supposed to be a part of a dog or hook used in hauling logs, breaking its saws into particles, and causing other injuries to the mill. The piece of metal was so concealed and imbedded in the timber that it was not discovered by appellant, or by any of its agents or employees. There was no testimony showing that respondent, or any agent of his in the transaction, knew, or had reason to believe, that such metal was imbedded in the log.

The question for solution is, can a vendor, who is not the manufacturer of a given commodity, be held responsible for a latent defect therein, under the testimony as presented by the record in this cause? No authority is cited by appellant going that far, either on the ground of implied warranty or imputed negligence on the part of a vendor; and we confess an inability, after an extended research among different treatises on sales, and the decisions of courts, including those referred to by appellant's counsel, to find any such. The cases (*Tacoma Coal Co. v. Bradley*, 2 Wash. 600, 27 Pac. 454, 26 Am. St. 890, and *Huntington v. Lombard*, 22 Wash. 202, 60 Pac. 414) cited by appellant do not so hold. In the first of these, on page 603, the following language appears in the opinion: "There can be no doubt that the contract between the parties amounted to a warranty on the part of respondents of the quality of the brick ordered by appellant;" the court holding there was an actual warranty. In the lat-

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ter case, one of the questions considered by the court was whether the representations of the seller amounted to an actual warranty. The court held that they did.

In the case at bar, no representations were made by the vendor as to the quality of the merchandise sold, and there is no pretense of an actual warranty. So that, if the respondent is to be held, it must be upon an implied warranty. In *Dushane v. Benedict*, 120 U. S. 636, 7 Sup. Ct. 696, 30 L. Ed. 810, the rule as to the liability of a seller on an implied warranty is stated in the opinion in the following language: "When a dealer contracts to sell goods which he deals in, to be applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery, there is an implied warranty that they shall be reasonably fit for that purpose." The action was in assumpsit, brought by a rag dealer against Dushane and Stonebraker for rags sold and delivered. One of the defenses was a breach of warranty as to quality and soundness of the merchandise sold. On page 647, the court further says: "This evidence, taken in connection with that already mentioned, was in our opinion sufficient to be submitted to the jury, as tending to prove *that the plaintiff knew* that the rags which he sold and shipped as clean rags, fit to be used in the manufacture of paper, were in fact infected with the smallpox, and that he fraudulently represented them to be clean, intending to deceive and defraud the defendants;" thus making the rule rest on the fact of knowledge on the part of the vendor that the goods sold were not what they appeared to be, and on the fact that the purchaser did not have an opportunity to inspect them. In this case, as we say, there was no proof of knowledge on the part of the vendor that the defect complained of existed, and it was shown that they were in-

spected by the purchaser; hence, under the authority of this case, there was no implied warranty that the logs did not contain an unknown hidden defect. And such we think must be the rule. On the record, therefore, we think there were no material questions of fact which were required to be submitted to the jury, and that the court did not err in directing a verdict for the respondent.

The judgment of the superior court should be affirmed, and it is so ordered.

[No. 4662. Decided October 1, 1903.]

THE CITY OF SPOKANE, *Respondent*, v. PETER COSTELLO
et al., *Appellants*.¹

JUDGMENT—BOND TO SAVE HARMLESS FROM—DUE NOTICE OF SUIT. A notice to defend a suit given eleven days before the trial of an action against a city for personal injuries, is *prima facie* "due notice," making the judgment rendered against the city binding upon a contractor, under his bond to save the city harmless therefrom and agreeing to be bound thereby upon "due notice" thereof.

SAME. Such notice is not conclusive, and it is a good defense to an action on the bond that the notice did not give sufficient time to prepare for trial, that the city did not defend in good faith, and that a meritorious defense to the action existed.

SAME—ACTION TO RECOVER AMOUNT OF JUDGMENT—PROOF OF CONTRACTOR'S NEGLIGENCE—NONSUIT. In an action on a contractor's bond, conditioned to save the city harmless from all actions and claims for damages arising from the negligence of the contractor and agreeing to be bound by any judgment upon due notice of the suit, the city cannot recover the amount paid out on a judgment for damages, without showing that the negligence complained of in the damage case was the act of the contractor, and no such proof being offered, and the pleadings and record in the damage case failing to connect the contractor therewith, a nonsuit should be granted.

¹ Reported in 74 Pac. 58.

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Opinion Per FULLERTON, C. J.

SAME—ESTOPPEL. In such a case, a mere recital in the notice of the pendency of the damage suit is not proof that the negligence was the act of the contractor, nor would such recital operate as an estoppel against him.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered February 11, 1903, upon the verdict of a jury rendered in favor of the plaintiff by direction of the court, upon defendants' opening statement to the jury, and after overruling defendants' motion for a nonsuit. Reversed.

W. S. Gilbert and *John A. Pierce*, for appellants. The motion for a nonsuit should have been granted. *New York v. Brady*, 24 N. Y. Supp. 296; *S. C.* 28 id. 324; *S. C.* 30 id. 1121. The provision for "due notice" of the suit was intended to secure a reasonable opportunity to defend. *Somers v. Schmidt*, 24 Wis. 421, 1 Am. Rep. 191; *Hersey v. Long*, 30 Minn. 114, 14 N. W. 508; *Boyd v. Whitfield*, 19 Ark. 447.

John P. Judson and *A. H. Kenyon*, for respondent.

FULLERTON, C. J.—On September 12, 1899, the city of Spokane entered into a contract in writing with the appellant Costello, whereby the latter, for a consideration mentioned in the contract, undertook to grade and otherwise improve Nora Avenue from Division to Columbus streets, the same being a public street within the corporate limits of the city of Spokane. The contract contained, among others, the following provision:

"It is further agreed between the parties hereto, that during the continuance of the work herein agreed to be done, the party of the second part shall put up and maintain, at all times, such barriers and lights as will effectually prevent the happening of any accidents in consequence of said work for which said first party might be liable;

also that he will keep, save and hold said first party harmless from any and all suits or actions, liabilities, damage and claims for damages which may be brought or in any wise accrue against the said first party in consequence of the granting of this contract or from any act, negligence or omission of said second party, his agents, employees or workmen in the performance of the work under this contract, and said second party hereby assumes all damages occasioned by the digging up, use, or occupancy of said street in the performance of this contract, or which may result therefrom, or which may result from the carelessness or lack of skill of the second party, his agents, employees or workmen. . . ."

Simultaneously with the execution of the contract, the appellants executed and delivered to respondent a bond in the sum of \$4,000, conditioned for the faithful performance of the work, and that the obligors should "save the city harmless in each and every respect, and from all claims arising from any cause whatsoever, and shall also save and indemnify and keep harmless the said city of Spokane against all liabilities, judgment and costs and expenses which may in anywise accrue against said city in consequence of the granting of said contract or which may in anywise result from the carelessness or neglect of said principal, his agents, employees or workmen," The bond also contained the following provision:

"The undersigned principal and surety and each of them, further hereby agree, in consideration of one dollar, to them in hand paid, the receipt whereof is hereby acknowledged, and of the letting of said contract to said principal, as aforesaid, that when any judgment is recovered against said city of Spokane by reason of the carelessness or negligence of said principal, his agents, employees or workmen, in the performance of said contract, and when due notice has been given of the pendency of such suit, such judgment shall be conclusive against them

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and each of them, not only as to the amount of damages, but as to their, and each of their liability."

Pursuant to the terms of the contract, Costello entered upon the performance of the work of grading the street, and while he was so engaged, one Philip Born fell into an excavation made in the street, and received certain bodily injuries, to recover for which he afterwards began an action in damages against the city of Spokane. In his complaint he alleged, among other things, that the city of Spokane had been negligent in leaving the excavation, into which he fell and was injured, open and exposed and without any proper protection by guards and lights, but did not aver that the excavation was one made by Costello in the prosecution of the work of grading the street, or refer in any manner to the fact that Costello had a contract for improving the same, or was then engaged in prosecuting the work.

The action was begun on the 7th of March, 1900. The city answered on the 25th day of September, 1900, to which a reply was filed and the case put at issue on October 8, 1900. In neither of these pleadings was any reference made to the fact that appellant Costello had a contract for, or was engaged in, improving the street at the time the injury to Born occurred. On the 26th day of August, 1901, after the cause had been set for trial, the city caused to be served on Costello and his bondsmen a copy of the complaint in the action of Born against the city, and the following notice:

"Spokane, Wash., August 22nd, 1901.

"To Peter Costello, and to American Bonding & Trust Company of Baltimore City:

"You, and each of you, are hereby notified that one Philip Born has commenced an action to recover damages against the city of Spokane for personal injury alleged

to have been sustained by him, by falling into an unguarded excavation on Nora Avenue, in the night time, while you as contractor, were grading the same avenue. A copy of his complaint is herewith served upon you.

"Having given a bond to save the city harmless from any and all damages arising from your failure or neglect to place guards and lights at all excavations made by you, while grading said avenue, you are hereby notified to defend said action, or to take such steps as you may be advised in the matter.

"And you are further notified that you and your bondsmen will be held responsible by the city of Spokane for any and all damages and costs which may be recovered by plaintiff in said action.

"Yours respectfully, John P. Judson,
"Corporation Counsel for the City of Spokane."

The case was tried to a jury on September 7th and 9th, 1901, and resulted in a verdict in favor of Born for the sum of \$1,750.50, for which sum, together with costs, a judgment was entered against the city. An appeal was taken to this court from the judgment, where the same was affirmed. 27 Wash. 719, 68 Pac. 386. On April 29th, 1902, the city paid the judgment, and brought this action to recover the amount thereof from the contractor and his bondsmen, alleging in its complaint the facts, in substance, as above recited, and the further fact that Born was injured by falling into an excavation made by Costello while in the performance of his contract with the city, and that the recovery against it by Born was because of the negligent acts of Costello, from which he had, in his contract and his bond, on which the other appellant was surety, undertaken to save the city harmless.

On the trial of the cause, the respondent introduced in evidence the contract between itself and Costello, the bond given to secure the faithful performance of the contract,

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the amended complaint in the case of Born against itself, its answer thereto and the reply of Born, the verdict of the jury, the judgment therein, the remittitur from this court sent down after the affirmance of the judgment, the notice to defend the Born action and the service thereof, and proved that it had paid the judgment with costs in the Born case, and then rested. The appellants thereupon moved for a nonsuit, basing their motion on the contention that the city had failed to prove that the judgment in the Born case was recovered because of the negligence, or alleged negligence, of the appellant Costello, while engaged in the performance of his contract to grade the street. The motion was overruled, whereupon the appellants made a statement of their case to the jury, at the conclusion of which the respondent moved for a directed verdict. This motion the court granted, directing the jury to return a verdict for the amount the city had proved it had paid to satisfy the Born judgment, with interest. Judgment was afterwards rendered upon the verdict, and it is from that judgment this appeal is taken.

The appellants' first assignment of error is that the court erred in overruling their motion for a nonsuit. By referring to the conditions of the contract and bond set out, it will be noticed that the contractor and his surety undertook to save the city harmless from all damages it should become liable for because of the negligent performance of the contract by the contractor; and further agreed that, in case an action should be brought against the city for damages growing out of the negligence of the contractor in the performance of his contract, and due notice of the pendency of the action should be given them, and a judgment should be afterwards obtained in the action, such judgment should be conclusive against them, not only

as to the amount of damages recovered, "but as to their and each of their liability."

It is plain, therefore, that if the act of negligence complained of by Born, and for which recovery was had against the city, was the act of the contractor, Costello, while engaged in the performance of his contract, and due notice of the pendency of that action was given the contractor and the bondsman, they cannot now be heard to say that the damages recovered were excessive, or that the act complained of was not in fact negligent, or dispute in any manner the validity of the judgment or their liability to the city therefor. Hence it was not necessary for the city, in order to make a *prima facie* case, to again litigate the question whether the acts complained of were in fact negligent; it was enough for it to show that the act complained of by Born as negligent was the act of Costello, and that due notice of the pendency of that action had been given to Costello and his bondsman. The question for consideration under this assignment is, had the plaintiff, at the time it rested its case, shown these facts?

As to the question of due notice, we think the respondent made a *prima facie* case. It is true that the action was begun in March, 1900, put at issue in October of that year, tried nearly a year later, and that notice of the pendency of the action was not given the appellants until eleven days before the trial; yet the court cannot say, as a matter of law, that no sufficient time was given them to prepare for and present a defense to the action. It must be remembered that the action was primarily against the city, that the city had denied all of the allegations of negligence set out in the complaint, and presumptively had made preparation for a defense based on its denials. It will not be presumed that it neglected that duty, or that it was not

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otherwise fully prepared to present, to the court and jury, the facts concerning the transaction as they actually existed. If this were so, there was nothing left for the appellants to do in the way of preparation. If, therefore, as a matter of fact, the city had neglected its duty, or if for any cause the notice given was insufficient, it should have been made to appear affirmatively, before the court would be warranted in saying the judgment was not binding upon the appellants.

The other branch of the question, namely, was there any proof that the act of negligence complained of was the act of the contractor, committed while in the performance of his contract? we think must be answered in the negative. As we said in passing, there was nothing in the complaint, answer, reply, verdict, judgment, or remittitur in the Born case, introduced in evidence, which in anyway connected the contractor with the act of negligence sued upon. The only proof there was at all on the question was the inference that might be drawn from the notice given the contractor and bondsman to come in and defend the action. But, in our opinion, that was insufficient. It was evidence that the city believed then, as it believes now, that the act of negligence complained of by Born was the act of the contractor, and it recited its claim in the notice as it now alleges it in its complaint. But the one is no proof of the other. It was no proof of the allegations of its complaint to introduce its former recital of the fact. Nor does the recital constitute an estoppel because served upon the appellants. It was merely notice of the city's claim, which, should it afterwards be made to appear was a truthful recital, would prevent a further contest on the questions litigated in the Born action. But it must be shown by evidence that the recitals are true; they do not prove them-

selves. At the time the plaintiff had rested, therefore, it had not made a *prima facie* case, and it was the duty of the court to have granted the nonsuit, unless leave should have been obtained therefor and the missing proofs supplied.

The second assignment of error is that the court erred in holding that the facts stated by appellants' counsel did not constitute a defense to the action. In his statement, counsel said, in effect, that the appellants would show the jury that the notice given them of the pendency of the Born action was not given them in sufficient time to prepare a defense to the action, that the city did not defend in good faith, and that a meritorious defense to the action existed. The trial court seemed to conclude that the notice of the pendency of the Born action given the appellants was, as a matter of law, due notice, and hence it was immaterial whether the city defended in good faith, or whether a meritorious defense did or did not exist to that action.

Doubtless, if the notice of the pendency of the action given the appellants be "due notice," within the meaning of that phrase as used in the bond, the court was correct in its holding that the judgment concluded the other questions against the appellants. But, while we hold it *prima facie* sufficient, we think it too much to say that the notice was due notice as a matter of law. It was given, as will be remembered, some seventeen months after the action was begun, nearly a year after it was put at issue, after it had been set for trial, and only eleven days before the time fixed for the trial. Had the appellants been named as defendants in the action, default could not have been taken against them for want of an appearance until twenty days after the date of service; and certainly a shorter

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Syllabus.

period ought not to be held conclusive as a matter of law, when the parties offer to show, as a matter of fact, that it was not sufficient. The court should have permitted the defendants to make their showing to the effect that the notice given them of the Born action was not in time to enable them to make a defense, and, if they made a *prima facie* case—that is, introduced some substantial evidence upon the question—allowed them to contest anew with the respondent Born's right of recovery, instructing the jury to the effect that they should consider the latter question only in case they found that due notice of the pendency of the original action had not been given the appellants.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, ANDERS, DUNBAR, and MOUNT, JJ., concur.

[No. 4653. Decided October 1, 1903.]

T. M. REED, JR., *et al.*, Appellants, v. JANE L. PARKER
et al., Respondents.¹

DEMURRER—ERROR—WAIVER BY PLEADING OVER. Error in sustaining a demurrer to a complaint is waived by the filing of an amended complaint.

APPEAL—REVIEW OF FINDINGS. Findings of the trial court that an absolute deed was not intended as a mortgage will not be disturbed when it does not manifestly appear that the court erred as to the weight of the evidence.

MORTGAGES—DEED FROM MORTGAGEE—WHEN NOT AN ASSIGNMENT—OPTION TO REPURCHASE. Where an absolute deed is given as a mortgage, a conveyance by the mortgagee at the owner's request to a third person, who pays the debt, is not to be construed as an assignment of the mortgage when the same was made pursuant to an agreement with the owner including additional consideration, and reserved a mere option to repurchase the property.

¹Reported in 74 Pac. 61.

33 107
137 305
37 380
138 46

MORTGAGES—NECESSITY OF DEBT—OPTION—CONDITIONAL SALE—ABSOLUTE DEED—WHEN NOT A MORTGAGE. A contract providing that the defendants should take title to and possession of plaintiffs' realty, upon discharging a mortgage and other liens thereon, and that plaintiffs should have the right to repurchase within two years upon repayment of the sums paid with interest and taxes, is not a mortgage, but is a mere option or conditional sale, which is forfeited after expiration of the time, where the contract expressly so provides, and there was no gross inadequacy of price, and no obligation on the part of plaintiffs to repay said sums, as there was no debt capable of enforcement and no mutuality of right to foreclose and redeem.

SAME—INADEQUACY OF PRICE. In such a case where the premises were worth \$2,500, and the amount paid was over \$1,700, with interest and taxes for two years, there was no gross inadequacy of price.

Appeal by plaintiffs from a judgment of the superior court for Thurston county, Linn, J., entered January 5, 1903, upon the findings and decision of the court in favor of defendants, after a trial before the court without a jury, dismissing on the merits a complaint to reform a deed as a mortgage, and decreeing that the defendants are the owners in fee of the premises. Affirmed.

G. C. Israel, for appellants.

Vance & Mitchell, and *Walker & Munn*, for respondents.

HADLEY, J.—On September 30, 1898, appellants were the owners of certain real estate in Thurston county. They had previously conveyed said property by deed to one George S. Allen, and received from the latter a written agreement in the nature of a defeasance, whereby he agreed to reconvey the premises to them upon their payment of a named sum of money within a specified time. The deed was made in consideration of, and to secure, an existing indebtedness, and on the date above mentioned said indebtedness was still unpaid. At the same time a

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prior mortgage existed against said property in favor of one M. Augusta Allen for the sum of \$1,000.

The specified time for payment under the George S. Allen contract being near at hand, the appellant Ida McKenny Reed, for herself and as attorney in fact for her husband and co-respondent T. M. Reed, Jr., was desirous of arranging to pay the same. Mrs. Reed, her husband being in Alaska, endeavored to devise some plan for raising the necessary money to pay said claim. She entered into negotiations with the respondent Maude P. Anderson, her intimate personal friend, for the purpose of trying to formulate a plan. Said Maude P. Anderson is the daughter of respondents Jane L. Parker and John G. Parker, and is the wife of respondent I. W. Anderson. Mrs. Anderson actively conducted the negotiations with Mrs. Reed, which finally resulted in the execution of a deed by said George S. Allen and wife, conveying the property in question to said Jane L. Parker, and in the further execution of a written contract, on the date first above named, between Mrs. Parker and husband upon the one part, and Mrs. Reed and husband upon the other. Mrs. Anderson claims to have conducted the negotiations in behalf of her mother and father, who are somewhat advanced in years. Respondent Munn acted as counsel for the other respondents during the negotiations. Subsequently the property was transferred to him by deed, but he claims no interest therein, and says he holds the legal title simply as trustee for Mrs. Parker.

Contemporaneously with the execution of the deed and contract, Mrs. Parker, at the request of Mrs. Reed, paid to George S. Allen the amount of his claim, together with some other small claims against the property, amounting in all to the sum of \$665.84. When George S. Allen re-

ceived said payment, he, at the request of Mrs. Reed, conveyed the property to Mrs. Parker, and she and her husband thereupon entered into possession of the same, and occupied it as a home.

The said written contract executed at that time recites, in substance, that Jane L. Parker is the owner of the premises, and desires to give a good and sufficient contract for the sale and conveyance thereof; that she and her husband agree that, at the expiration of two years from the date of the instrument, they will convey by good and sufficient deed to Mrs. Reed and husband the premises described, upon the payment of the following sums of money, to-wit: the sum of \$665.84, paid as aforesaid by Mrs. Parker to procure the deed from George S. Allen; also the sum of \$50, paid by Mrs. Parker to discharge the premises from the lien of the judgment; also the sums which may be hereafter expended by Mrs. Parker in the payment of interest on the said M. Augusta Allen mortgage of \$1,000, which mortgage constitutes a first lien upon the premises and secures a principal debt in said sum; also all sums expended by Mrs. Parker in the payment of taxes due or hereafter to become due against said premises, including taxes paid at the date of instrument; also all sums expended in maintaining insurance on the premises or the improvements thereon in such sum as shall secure the investment of Mrs. Parker; also ten per cent. interest upon each sum so expended, from the time of its expenditure until the expiration of said two years.

It is further provided that, if the payment of said several sums of money be not made to Mrs. Parker and husband at the expiration of two years from the date of the contract, then the rights of Mrs. Reed and her husband shall lapse and be forfeited. Mrs. Parker and her hus-

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band, from time to time as required, made the above enumerated payments. The two years expired, and appellants failed to make the payment as in the contract provided. Some time thereafter Mrs. Parker and her husband paid the principal of said \$1,000 mortgage, the interest having been kept up by them, and procured its satisfaction of record.

Some months afterwards Mrs. Reed and her husband demanded an accounting, that they might pay the amount called for by said contract and procure a conveyance of the said property to themselves. The demand was refused. They then brought this action, and alleged that the aforesaid transaction constituted a loan to them, secured by their mortgage upon the said real estate, and that the transaction was understood by the parties, and intended by them, to be a loan secured by mortgage. It is also alleged that Mrs. Reed was unused to business transactions, and relied upon respondents as her personal friends, and particularly upon Maude P. Anderson, to have the instrument so drawn that it would state a contract amounting to a loan secured by mortgage. The complaint prays that the deed to Mrs. Parker shall be declared to be a mortgage, that an accounting may be had for the purpose of redemption, and that a decree be made cancelling and annulling the alleged mortgage upon the payment of the necessary amount.

Issue was joined by way of denials and affirmative defenses to the effect that said transaction was not, and was not intended to be, a loan, but was a purchase of the property by Mrs. Parker, with a contract to sell, granting to Mrs. Reed and husband a mere option to purchase at the expiration of two years. A trial was had before the court without a jury, which resulted in a judgment in favor of

defendants to the effect that the plaintiffs had no right, title, or interest in, or claim to, said land, either in law or equity. The plaintiffs have appealed.

It is first assigned that the court erred in sustaining the demurrer to the amended complaint on the ground that it did not state facts sufficient to constitute a cause of action. After ruling upon the demurrer, appellants obtained leave of court to file a second amended complaint, which was thereafter filed. Issue was joined with this second amended complaint, and the trial was had under such issues. We have already held that an erroneous ruling sustaining a demurrer to a complaint is waived by taking leave to amend and thereafter filing an amended complaint.

"To make the error available, the pleader must refuse to amend, and stand on his complaint, and appeal from the judgment the trial court may enter against him." *Prescott v. Puget Sound Bridge etc. Co.*, 31 Wash. 177, 71 Pac. 772.

It follows that this claim of error cannot now be reviewed.

Several assignments of error are directed to the findings of the court. The findings are extensive, but, in substance, they cover the ground hereinbefore stated with reference to facts which are practically undisputed, and also further ground concerning disputed facts, in effect as follows: That, at the beginning of negotiations between the parties, Mrs. Reed, acting for herself and as attorney in fact for her husband, stated to the respondents Parker and Maude P. Anderson that George S. Allen held a warranty deed to the premises in controversy, and had given appellants a contract by which they could redeem on or before October 1, 1898; that said Allen would not grant any extension of time, but demanded fulfillment of the contract

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on or before the date named; that appellants then offered to sell the premises to the said Parkers and Maude P. Anderson, and give therefor a deed of full warranty, if they would pay and satisfy the claim of said Allen, and would receive a deed of warranty from said Allen and wife, and would contract and agree with appellants that they would, at the expiration of two years, resell the property to appellants for the price aggregating the sums hereinbefore set out; that the fair market value of the property at the time of the transaction was \$2,500; that Mrs. Reed, acting for both appellants, expressed a desire to obtain an option to repurchase said property at said time, in said way, and for said sums, and did not desire to make a loan or to execute a mortgage; that she did not require, ask for, or obtain any contract of defeasance concerning said property; that thereupon the contract which in effect is hereinbefore stated was drawn up, executed, and acknowledged by the parties thereto; that the same was carefully read by Mrs. Reed, explained to her, and fully understood by her; that said contract does, and did, express the real meaning and intent of the parties thereto; that it was never understood between the parties to the contract that appellants were under any moral or legal obligations to repurchase the property, or to repay said money, but that it was the intention that appellants might have an option to repurchase, and might pay said money consideration, if they elected to exercise such option, but not otherwise. It is further found that respondents in no way deceived or mislead appellants, or conspired to do so; that Maude P. Anderson acted as agent for her mother, Jane L. Parker, in all negotiations leading up to the sale and purchase of the property. The above seem to us to be the only material points in the findings necessary to be stated here.

We have carefully read all the evidence, and we are unwilling to say that the weight thereof does not support the findings of the court. If the written contract is considered alone, without reference to any extrinsic testimony, we think it clearly sustains the findings. The other testimony, as it appears in the record, is such that the trial court could well find that the weight thereof was with respondents; and, since it does not manifestly appear to us that the court erred in that regard, we shall not disturb the findings.

It is next assigned that the court erred in its conclusions of law to the effect that the transaction between the parties was a conditional sale of the premises in controversy, and was not a mortgage. The appellants urge that the deed held by George S. Allen was a mortgage, which is probably true, inasmuch as it was made in consideration of a prior indebtedness, and was accompanied with a contract to reconvey, by the terms of which appellants personally obligated themselves to repay the debt within the time named. Upon the theory that the said Allen deed was a mortgage, appellants further urge that, when he made his deed to Jane L. Parker upon her payment to him of the amount of his claim, he thereby assigned to her his mortgage, and that she then stood in the position of an assignee of said mortgage.

It will be remembered, however, that the transfer from Allen to Mrs. Parker was procured at the instance of appellants, and was not based wholly upon the payment of the Allen claim, but upon the further consideration that Mrs. Parker should make certain other payments, which were not secured by the Allen transaction, and which in no way concerned him as mortgagee. The deed from Allen was therefore, in effect, a transfer from appellants, since it was upon their request and for a consideration named

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and fixed by them. The payment to Allen extinguished his claim, canceled the mortgage feature thereof, and the amount paid him became a part only of the consideration moving to appellants for the transfer which they caused to be made to Mrs. Parker. We think, therefore, that Mrs. Parker cannot be said to have been the assignee of a mortgage from Allen, but was an actual purchaser from appellants, receiving the title by their direction from Allen. Contemporaneously with the transfer of the title thus effected, the written contract with appellants was executed, and Mrs. Parker and husband entered into possession of the property and have since retained the same.

Under the findings as to value, it cannot be said that there was gross inadequacy of price, when we consider the amounts paid and assumed by Mrs. Parker, together with the outstanding \$1,000 mortgage against the property. That fact, together with all other facts and circumstances in evidence considered by the court, led to the finding that the contract expressed the real intent and meaning of the parties. We must therefore refer to its terms to determine its legal effect. Its principal terms have already been stated. There is no provision therein by which appellants promised to pay the sums of money mentioned, and no language from which it can be inferred that they were so obligated. We think Mrs. Parker would have been unable, under the terms of the contract, to enforce the payment of said sums as an indebtedness of appellants, and that the latter were simply privileged to make the payments and repurchase if they chose so to do. After stating that if appellants shall fail to make payment at the time specified, the language of the instrument is, "then the rights under this contract on the part of the parties of the second part shall lapse and be forfeited." The fol-

lowing clause concludes the statement of the terms of the agreement: "It is especially understood and agreed between the parties hereto that the said parties of the second part have no right or interest in or to said premises except a right to the conveyance of said premises upon the terms herein agreed at the expiration of said two years."

The quoted words are so direct and unequivocal that we are unable to interpret them as being susceptible of more than one meaning; that is to say, that a mere option to purchase, or conditional sale, was intended. Especially is this so, in view of the fact that it is expressly stated that Mrs. Parker is the owner of the premises, and no obligation to pay the money as an element of an intended mortgage is assumed by appellants. To have created the relation of mortgagor and mortgagee between the parties, it was essential that there should have been a debt capable of enforcement by action, and which was intended to be secured by the mortgage. There could be no debt when there was no liability therefor. A mere privilege to pay did not impose an obligation so to do. Upon this subject Chief Justice MARSHALL observes:

"It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a preexisting debt, nor any covenant for repayment. An action at law, for the recovery of the money, certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to the contrary must have been

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produced to justify a decree against him." *Conway's Ex'rs v. Alexander*, 7 Cranch, 218, 237.

An instrument in writing cannot be converted into a mortgage when there is absence of mutuality of right both to foreclose and redeem. *Chaires v. Brady*, 10 Fla. 133. See, also, *Rue v. Dole*, 107 Ill. 275; *Saxton v. Hitchcock*, 47 Barb. 220; 1 Jones, Mortgages (5th ed.), § 269; 20 Am. & Eng. Enc. Law (2d ed.), 942, and cases cited.

It being established that the transaction was a conditional sale, and not a mortgage, it follows that the failure of appellants to comply with the expressed terms of the contract operated to forfeit their rights thereunder. The time for payment expired September 30, 1900. No tender of payment was made about that date, and no tender or demand for an accounting was made until June, 1901. One seeking a reconveyance to himself under a conditional sale must strictly comply with the conditions imposed upon him. 4 Kent, Commentaries (14 ed.), 144; *Slowey v. McMurray*, 27 Mo. 113, 72 Am. Dec. 251; *Hoopes v. Bailey*, 28 Miss. 328. To the same effect is *Swarm v. Boggs*, 12 Wash. 246, 40 Pac. 941.

For the foregoing reasons, we believe the court did not err in its conclusions of law, and the judgment is affirmed.

FULLERTON, C. J., and ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4681. Decided October 2, 1903.]

BLANCH C. TURNER, *Appellant*, v. W. W. D. TURNER
et al., *Respondents*.¹

JUDGMENT—VALIDITY—UNAUTHORIZED APPEARANCE OF ATTORNEY—NATURE OF PROOF. A judgment entered upon the appearance of an attorney without service of process will be set aside on account of the attorney's want of authority only upon clear and convincing proof that the appearance was unauthorized.

PLEADINGS—DENIAL—SUFFICIENCY—AMENDMENT PRESUMED. An answer stating that truthful and untruthful declarations are so intermingled that it is impossible to segregate the allegations and that therefore defendant denies each and every part thereof is not bad as an admission, and may be considered as amended when objected to for the first time in the supreme court.

JUDGMENT—ACTION TO SET ASIDE—AUTHORITY OF ATTORNEY TO APPEAR—EVIDENCE—SUFFICIENCY. A judgment of divorce entered upon the appearance of an attorney for the wife should not be set aside upon the testimony of the wife that the appearance was not authorized, where the attorney was her general counsel, and it appears from his letters that he sent her a copy of the summons and complaint shortly after service with the answer thereto, notified her of the decree immediately, advised her of its effect, and she recognized the divorce and expressed gratification thereat, and where the husband and his attorney testify that before suit she instructed service to be made upon such attorney.

HUSBAND AND WIFE—DIVISION OF COMMUNITY PROPERTY BY CONSENT—ACTION TO SET ASIDE—SUFFICIENCY OF EVIDENCE. In an action by a divorced wife for a division of community property, a finding that the same was fairly divided by mutual consent before the decree, is supported by evidence of the husband that she received property of the value of \$192,000, while he received but \$171,000, although the wife testifies that she received the above as gifts and claims half of the balance, and that the husband received \$37,000 more than she received.

Appeal from a judgment of the superior court for Spokane county, Belt, J., entered October 20, 1902, upon findings in favor of the defendant, dismissing plaintiff's com-

¹Reported in 74 Pac. 55.

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plaint on the merits, after a trial before the court without a jury. Affirmed.

S. G. Allen, James Dawson, and L. G. Nash, for appellant.

W. H. Plummer, for respondent.

FULLERTON, C. J.—The appellant instituted this action primarily to set aside and annul a decree of divorce entered by the superior court of Spokane county on the 15th day of August, 1899, in an action therein pending, brought by the respondent against the appellant; and, secondarily, to secure a division of the community property owned by the parties at the time the decree was granted, in case the same be not set aside.

In her complaint the appellant alleges, among other things, that she and the respondent intermarried in the year 1877; that they lived together as husband and wife from that time until about the month of November, 1897, the principal part of the time in the city of Spokane; that on the date last named the respondent, for the purpose of fraudulently and secretly obtaining a divorce from her, induced her to leave Spokane, and go to the city of Mobile, in the state of Alabama, and there take up her residence, promising that he would follow her as soon as his business affairs in Washington could be settled, when they would again live together as husband and wife; that she believed his representations; and, believing them, did go to Mobile, Alabama, and establish a residence, but that the respondent did not follow her as he had promised; that she thereupon returned to Spokane for the purpose of living in that city with respondent, but that he refused to see her or permit her to come to his apartments, and that, after repeated

rebuffs from respondent, she returned to Mobile; that thereafter, and on the 1st day of August, 1899, the respondent began an action against her for a divorce, alleging in his complaint that she had abandoned him without cause and against his will, and continually asserted that she would no longer live with him; that no process was sued out or served on her in the action, but that the respondent, as a part of his fraudulent scheme, hired an attorney to pretend to represent her in the action, and that the attorney did file an answer therein, verified by himself as her attorney, purporting to admit certain allegations of the complaint and deny certain others; that afterwards a stipulation was entered into by the attorney pretending to represent her, and the attorney representing respondent, agreeing to the appointment of one John M. Gleeson as judge *pro tempore* to try the cause, and that Gleeson was appointed in pursuance thereof; that he afterwards heard the cause, and rendered the decree of which she complains; that the fees of the attorney pretending to represent her, as well as the costs of court taxable against her, were paid by the respondent—all of which, she avers, was done without her knowledge or consent, and in pursuance of the fraudulent scheme of the respondent to procure a divorce from her, and that she was kept in absolute ignorance of the proceedings until long after the same were consummated. It is then alleged that the parties own community property to the value of \$250,000, all of which is in the possession of the respondent. The prayer is in the alternative, asking for an annulment of the divorce decree, and, if that be denied, a division of the community property.

The answer put in issue the allegations of the complaint going to the appellant's right of recovery, and set out five separate defenses, one of which was to the effect that the

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community property of the parties had been divided long prior to the divorce by their mutual consent.

The trial court found the issues of fact in favor of the respondent, and held that the decree of divorce was a valid decree, that the community property of the parties had been divided by their mutual consent, and entered a judgment accordingly.

The evidence was mainly directed to the two principal questions suggested in the complaint; namely, was the appearance of the attorney who purported to act for the appellant in the divorce action authorized by her, and was there a mutual division of the community property? But before passing to a review of these questions, it is well to notice the objection of the respondent to the effect that this action cannot be maintained. He argues that a judgment entered on the unauthorized appearance of an attorney is only voidable, and hence the appellant must show, among other things, diligence in commencing her action to set the judgment aside before she is entitled to be heard, and that so far from exercising diligence in that regard she has been guilty of gross laches. But whatever may be the rule elsewhere, it is the settled doctrine in this state that a judgment entered upon the unauthorized appearance of an attorney, where no original process has been issued and served, is void, and can be set aside at the instance of the judgment debtor in an action instituted for that purpose, whether innocent third persons may suffer thereby or not. *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690, 40 Am. St. 922; *Ashcraft v. Powers*, 22 Wash. 440, 61 Pac. 161. A judgment entered on the appearance of an attorney without the service of original process, however, is presumed to be valid, and will be set aside only upon clear and convincing proof that the appear-

ance by the attorney was unauthorized. Cases *supra*. It cannot be set aside by showing that the evidence on which it was granted did not justify granting it, or that the evidence was false in fact and known to be so by the party obtaining the judgment; for these matters were at issue in the original case, and the judgment concludes any after inquiry into them.

On the question of authorization, it is first argued that the answer, purporting to put in issue the allegation of the complaint to the effect that the appearance was unauthorized, raises no issue, and is an admission of truth of the matters attempted to be denied. The part of the answer thought to work this result is as follows:

"Defendant . . . admits paragraph 5 down to and including the words, 'which complaint was duly verified, and filed in this court on the 13th day of August, 1899', . . . and defendant alleges that the remaining part of said paragraph is so intermingled with truthful and untruthful declarations that it is impossible to further segregate said allegations, and therefore defendant denies each and every part of said paragraph, excepting that which is heretofore admitted to be true."

It may be that this part of the answer was subject to successful attack in the court below by motion in some form, but, whether this be true or not, it is certainly not an admission of the allegations which it purports to deny. On the contrary, it is a positive denial of all the allegations of fact contained in the paragraph named not expressly admitted, and it is too late to complain for the first time in this court that the denial is not in accord with the rules of good pleading. Where a pleading is treated by the parties in the court below as sufficient, and the cause is tried in that court as if upon sufficient pleading, this court will treat it as sufficient on the appeal of

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either party, unless, of course, it discloses an action without the jurisdiction of the trial court, or fails to state a cause of action or defense. Moreover, the defect here complained of is one that could have been cured by amendment; and in such a case, where the objection is raised here for the first time, this court is required by statute to treat the pleading as amended.

Turning to the evidence, the appellant testified in her examination in chief, and every time the question was asked her directly on her cross-examination, that the attorney's appearance for her in the divorce action was unauthorized. She admitted that he held a retainer from her, and was looking after her legal business in Spokane, and that she had consulted with him concerning the probabilities of such a suit, but she is positive in her assertion that she never authorized him to appear in the proceeding or waive the service of process upon her. There are circumstances shown by the record, however, which appear to put her memory at fault.

The attorney who purported to represent her was an able and distinguished lawyer, who had enjoyed a large and varied practice, and who knew well the effect upon the judgment had his appearance in the proceedings not been authorized. He died just prior to the trial, and we have not the benefit of his testimony, but his letters to the appellant, written just before and just after the decree, are in the record. These, while advising the appellant as to the status and effect of the decree and her rights thereunder, make no mention of its possible illegality, nor is it otherwise even remotely suggested that he had appeared without her express authorization. In this connection it may be well to add there was no proof of the allegation that his fees had been paid by the respondent. The only

foundation for that charge was that he had, in the name of the appellant, after the service of the summons and complaint upon him, applied to the court and obtained the usual order for suit money, which the respondent paid into court pursuant to the order.

Again, the appellant is not very happy in her memory concerning many of the details of the transaction. She testified, that she knew nothing of the pendency of the action until she saw it published in a Spokane paper that a decree had been rendered therein; that she did not know that the attorney had assumed to appear for her until long after she had knowledge of the rendition of the decree; and that she had never acquiesced or thought of acquiescing in the decree. The letters of the attorney, however, introduced by her, show that he enclosed her a copy of the complaint and his answer thereto shortly after the service of the complaint on him, and prior to the entry of the decree, and that immediately on the entry of the decree he notified her of the fact. In each of these letters it was made clearly to appear that the attorney had purported to represent her in the proceedings. Her answers to these letters shows that she could not have been misled as to this fact. In one of them written under date of the 28th of August, 1899, thirteen days after the date of the decree, she expresses her gratification at the result; and a year later she again wrote the attorney, saying that she had just been reading over his letters, and asks certain questions concerning the status of the property owned by them at the time of the divorce, in which she uses the phrase "our divorce," in referring to the decree she now seeks to set aside. In this letter, although she must again have had her memory refreshed on the matter of the appearance by the attorney, she makes no mention of the fact that his appearance was unauthorized.

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In the light of these facts, it would seem that it was almost too much to say that it appeared by a preponderance of the evidence that the appearance of the attorney was unauthorized; yet, in addition to this, there is the positive evidence of the respondent, as well as that of his attorney, to the effect that she told them while in Spokane, a few months before the divorce action was commenced, and at a time when the matter was talked over, that this particular attorney was in her employ, and that any service of papers they desired to make in the divorce action could be served on him. We conclude, therefore, that there is in the record no sufficient evidence to justify vacating the divorce decree.

On the second question, whether or not there is any community property subject to division, we think the weight of the evidence is with the finding of the trial court. The respondent testified that the property was all divided, the appellant receiving money and property aggregating \$192,000, while he received but \$171,000 as his proportion of the common property. The appellant does not seriously dispute receiving property to the value mentioned, but seems to contend that it came to her as gifts from her husband, and that she is not only entitled to that, but to a one-half of that taken by her husband in addition. But we cannot think this the intention of either of the parties at the time the divisions were made. It was clearly their purpose to make a division so that each might hold his or her portion as separate property. It is argued further, however, that the appellant never received her just share of the community property; that, while the respondent testified that she received \$192,000 as against \$171,000 awarded to him, when he undertakes to list the properties each received in detail he shows that the value

of the portion received by him equals \$229,800, or \$37,800 more than the appellant received. We have carefully read the evidence on this point, and, while it is not to our minds as clear as it could have been made, we think it supports the judgment of the trial court rather than the conclusion the appellant draws from it.

These conclusions require an affirmance of the judgment appealed from, and it is so ordered.

HADLEY, MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 4590. Decided October 3, 1903.]

LAKE WHATCOM LOGGING COMPANY, *Appellant*, v. S. A.

CALLVERT, *Commissioner of Public Lands, et al.*,

*Respondents.*¹

TIDE LANDS SALES—IMPROVEMENTS—APPRAISEMENT—RAILROADS. A railroad across tide lands constructed on piles and trestle work is not an improvement entitling the owner to have the same appraised before sale of the tide lands, within the meaning of Laws of 1897, p. 231, defining improvements to be "fills of a permanent character and all structures used for trade, business, commerce or residence, excepting capped piles and similar structures or fixtures," since the statute contemplates structures which enhance the value of the land.

SAME—ACTION TO ANNUL SALE—EMINENT DOMAIN. A state contract for the sale of tide lands made without appraisal of improvements will not be annulled at the suit of a common carrier, the owner of a railroad built on piles across the same, since the appraisal of the road as an improvement would compel the purchaser to pay its value without acquiring title to the materials composing it, and a right of way could subsequently be condemned upon paying the value of the land taken without regard to the value of the improvements thereon.

Appeal from a judgment of the superior court for Skagit county, Neterer, J., entered July 12, 1902, dismissing

¹Reported in 73 Pac. 1128.

the action after sustaining a demurrer to the complaint. Affirmed.

Dorr & Hadley, for appellant.

The Attorney General and *Elihu R. Sherman*, for respondents.

FULLERTON, C. J.—In 1898 the respondent McMillan entered into a contract with the state of Washington, through its commissioner of public lands, for the purchase of certain tide lands to which the state had title, situated in Skagit county. This action was brought to set aside and annul the contract, and prevent its being further carried into execution by the parties thereto. A demurrer to the complaint was interposed and sustained, and this appeal is from a judgment of dismissal, entered after the appellant had elected to stand on its complaint and refused to plead further.

The gravamen of the complaint is found in the following paragraphs:

“3. That the plaintiff is the owner and in the possession of the following described real estate situate in Skagit county, state of Washington, to-wit: Lot one (1) of section 21, township 36 north, range three (3) east, W. M. And that said lands abut upon and have a water frontage on the waters of Puget Sound, and that tide lands of the second class abut and lie in front of said lands.

“4. That section sixteen (16) in said township and range adjoins said lands of plaintiff on the north and is school land belonging to the state of Washington.

“5. That prior to the 26th day of March, 1890, plaintiff's grantors, being the then owners of said lot one in section 21, aforesaid, built and constructed a line of railroad over and across said lot and over and across a small portion of the southwest corner of said section sixteen (16) and improved the tide lands in front of said section 16 by continuing said railroad and erecting and constructing

a line of railroad over and across said tide lands, said railroad being constructed on piles and trestle work from the high water line in front of said section to deep water in the waters of said Puget Sound, said improvements being of the aggregate value of four thousand dollars, and that plaintiff's grantors and this plaintiff, as their successor in interest, have ever since maintained and used said railroad and structure in the transportation and shipping of logs and timber products and other freight from said uplands to deep water in said Puget Sound.

"6. That on the ——— day of ———, 189——, the auditor of Skagit county, Washington, by virtue of an order by the board of land commissioners of the state of Washington, offered for sale and sold to the defendant J. B. McMillan, all the tide lands of the second class owned by the state of Washington, situate in front of, adjacent to, or abutting upon that portion of the United States government meander line described as follows: [describing it.] And that said lands so sold included the tide lands in front of the upland belonging to plaintiff aforesaid and also all the tide land upon which the improvements belonging to the plaintiff are situate as aforesaid, and that a return has been made of such sale to the said board of land commissioners for confirmation, and that on the 13th day of September, 1898, a contract for the purchase of said lands was issued by one Robert Bridges, the then commissioner of public lands of the state of Washington, a predecessor in office of the said defendant S. A. Callvert, to the said defendant J. B. McMillan.

"8. That this plaintiff is now, and it and its grantors have been, continuously ever since prior to the 26th day of March, 1890, the owners of said improvements placed upon said tide lands as aforesaid, and have maintained and used the same for purposes of trade and commerce.

"9. Plaintiff further alleges that the said pretended sale by the said auditor of Skagit county to said defendant McMillan, and the issuance of a contract of purchase of said tide lands to him by the commissioner of public lands

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of the state of Washington, was illegal, void and of no effect, for the reason that the law for the sale of said tide land as provided by the statutes of the state of Washington, was not complied with in making such sale, in that the improvements belonging to the plaintiff and his grantors on said tide lands, were never appraised prior to said sale, or at all, and that said tide lands were advertised to be sold in an entire body, the same being designated according to the number of chains on the meander line upon which said tide lands abutted, and the plaintiff or its grantors had no opportunity to bid for or purchase that portion of the tide lands upon which the improvements aforesaid were situated and which was necessary for use in connection therewith for the purposes of trade and commerce."

In *Sullivan v. Callvert*, 27 Wash. 600, 68 Pac. 363, in an opinion by Judge WHITE, we took occasion to review somewhat exhaustively the legislation on the subject, and held that, on the sale of tide lands of the second class belonging to the state, upon which there are improvements belonging to an individual, the construction of which was completed prior to March 26, 1890, or commenced prior to that date, and completed before January 1, 1891, the owner of such improvements was entitled to have the same appraised, and the appraised value thereof paid into the state treasury for his use; that such tide lands could not be sold in conformity with law without such appraisalment; and that, if the owner of the improvements seasonably protests against a sale attempted to be made without such an appraisalment, equity will intervene to prevent the completion of the contract. As the appellant alleges that it constructed its railroad across these tide lands prior to March 26th, 1890, it is plain that it has brought itself within the principle of this case, if such railroad is an improvement of the tide land, within the

meaning of that phrase as used in the statute, and its action has been seasonably commenced.

Is the appellant's road an improvement, within the meaning of the statute? We are of the opinion it is not. The statute in force when the contract of sale between the respondent McMillan and the state was entered into, and which confers upon the owners of improvements constructed upon the state's public lands the right to demand an appraisalment of the same, defined that term as follows:

"When referring to tide or shore lands and harbor areas, the word 'improvements' shall be interpreted to mean all fills or made ground of a permanent character, and all structures erected or commenced on said lands or actually in use for purposes of trade, business, commerce or residence prior to March 26, 1890, and completed before January 1, 1891: Provided, That ordinary capped piles or similar structures or fixtures shall not be considered an improvement." Laws 1897, p. 231, § 5.

It is evident from this definition that the statute contemplates by the word "improvement" a structure which will add value to the land, and which will be of use and benefit to the purchaser as owner of the land. The things enumerated as constituting improvements are all of this character. Fills and made ground of a permanent character tend to reclaim the land and fit it for use by the purchaser. A residence can be occupied by him, or let to the use of another. So also may structures, actually in use for the purposes of trade, business, or commerce. But a line of railroad track extending across the land, and terminating at each side thereof, cannot be of use as an improvement to the owner of the land, or tend in any way to enhance its value. The materials contained in it may be of some value, but structures valuable only for the mate-

rials they contain are clearly not "improvements," such as the statute contemplates.

But there is another reason why the demurrer was properly sustained. The respondent McMillan will not acquire title to the materials composing the appellant's road by the purchase of the land over which it crosses. If the allegations of its complaint be true, the appellant is a common carrier, possessing the power of eminent domain; and it can, after the respondent McMillan acquires the legal title to the land in question, condemn and acquire a right of way across it for its road, by paying the value of the land taken without regard to the improvements it has placed upon it. *Bellingham Bay & B. C. R. Co. v. Strand*, 14 Wash. 144, 44 Pac. 140, 46 Pac. 238; *Seattle & Montana R. Co. v. Corbett*, 22 Wash. 189, 60 Pac. 127. If, therefore, its improvements were such as added value to the land, it would be going too far to hold that the purchaser of the land should pay their value, when he can acquire no title to the same either by his purchase of the land or by such payment. This conclusion renders it unnecessary to discuss the question whether the action was seasonably commenced.

The judgment is affirmed.

DUNBAR, MOUNT, and HADLEY, JJ., concur.

[No. 4622. Decided October 3, 1903.]

PHILLIP MILLER *et al.*, Appellants, v. LAKE IRRIGATION
COMPANY *et al.*, Appellants and Respondents, and
PHILANDER WOOD *et al.*, Respondents.¹

LAW OF THE CASE—OBJECTIONS CONFLICTING WITH DECISION ON FORMER APPEAL. Objection to the establishment of priorities of right in the use of water in a stream and to injunctive relief, under the pleadings, cannot be made after the supreme court on a former appeal has established as the law of the case that such question is the vital question, and remanded the cause for the purpose of determining the same and perpetually enjoining interference therewith.

IRRIGATION—PRIORITIES—SUFFICIENCY OF EVIDENCE. Findings and conclusions establishing the priority of appropriations of water for irrigation not disturbed.

FINDINGS—NUMBER OF. The number of findings is immaterial where they are not conflicting and are within the pleadings and jurisdiction of the court.

Cross appeals from a judgment of the superior court for Chelan county, Neal, J., entered August 23, 1902, after a trial on the merits before the court without a jury. Affirmed.

Action to determine the priorities of right to the use of waters of a stream for purposes of irrigation. Two separate sets of findings were filed. The plaintiffs' claim was cut down, and established as first in time, and they appeal from that part of the decree making the reduction. The rights of defendants Wood, *et al.*, were decreed to be second in time and they accepted the decree. The two defendant irrigation companies took separate appeals from the whole decree.

The findings establish, that the first appropriators conducted water upon their premises by a canal having a ca-

¹Reported in 74 Pac. 61.

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Citations of Counsel.

capacity of 330 miner's inches; that for three years said canal carried water to its full capacity, all of which was used for irrigation, domestic, and mining purposes by the parties or their lessees; that during said time, patents were applied for under the desert land act, and the appropriators used such water rights in their final proof; and that all of said water was necessary to properly irrigate their lands. The court refused to find, as requested, that all of said 330 inches was used by them since the patents to their lands issued, but found that 200 inches had been used by the parties, or their lessees or licensees, ever since the diversion, "for irrigating their lands or other lands in the vicinity and also for mining purposes." The court concluded that appellants Miller *et al.* (the successors in interest of the first appropriators), had the prior right to 200 inches. All of the appellants excepted to the findings and conclusions.

An appropriation for irrigation and domestic purposes was found in favor of respondents Wood *et al.*, as second in point of time, to the extent of 200 inches. Judgment was accordingly entered awarding appellants Miller *et al.* the first right to 200 inches, and the respondents Wood *et al.* the second right to 200 inches, and perpetually enjoining the other parties from interfering with the use of the 400 inches aforesaid.

Kauffman & Frost and *Edward Pruyn*, for appellants Miller *et al.* All the water of their canal, 330 inches, was found by the court to be necessary to irrigate the land patented by the government to the first appropriators. To entitle a desert land claimant to sufficient water to irrigate his land, no cultivation is necessary. The bringing of water to and upon the land is all that is required, and is of itself a sufficient beneficial use. *Gallahan v. Sullivan*,

9 Land Dec. 6; *Dickson v. Auerbach*, 18 Land Dec. 16; *United States v. Mackintosh*, 29 C. C. A. 176, 85 Fed. 333; *Welch v. Garrett* (Idaho), 51 Pac. 405. Before the patent issues, the interior department must find as a fact that the settler is entitled to sufficient water to permanently reclaim the land from its desert condition. *Gallahan v. Sullivan*, *supra*. Sufficient diligence was shown, and the appellants are accordingly entitled to all of the said 330 inches diverted by them. *Hall v. Blackman* (Idaho), 68 Pac. 19; *Longmire v. Smith*, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308.

Mires & Warner, Graves & Englehart, and Victor Martin, for appellants Lake Irrigation Company *et al.* The findings did not establish the amount of water used for mining purposes, and the evidence showed that not to exceed 70 inches had been used on the lands of the appellants Miller *et al.*, for many years, and they should be limited to such amount. Where one suspends his appropriation for a long number of years, adds nothing to the area of his cultivation, and other rights to the waters become fixed, he cannot be restored to his original intended diversion or prospective appropriation, after such a long delay. *Fort Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Col. 1, 30 Pac. 1032, 36 Am. St. 259. *Senior v. Anderson*, 47 Pac. 454; *Barnes v. Sabron*, 10 Nev. 217; *Conkling v. Pacific Imp. Co.*, 87 Cal. 296, 25 Pac. 399; *Hindman v. Rizor*, 21 Ore. 112, 27 Pac. 13; *Cole v. Logan*, 24 Ore. 304, 33 Pac. 568; *Low v. Rizor*, 25 Ore. 551, 37 Pac. 82; *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534; Long, Irrigation, §§ 47, 51.

John D. Dill and John C. Kleber, for respondents.

PER CURIAM.—For a statement of this case, reference is made to the opinion of this court on a prior appeal, re-

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ported in 27 Wash. 447, 67 Pac. 996, where the case was remanded for further proceedings.

In answer to appellants' contention that the court had no authority, under the pleadings, to establish priorities or to grant injunctive relief, we refer to the opinion above cited, where this court said:

"The theory of the complaint is to quiet the title of contending claimants for the use of the waters of Stemilt Creek. It is also the theory of the answering defendants."

Again it was said:

"But the priority of right to the use of the waters from this stream was the vital issue before the court."

And in order, as it was said, that the superior court should have an opportunity to find the necessary facts, and to determine the priorities of the respective parties to the use of the waters in controversy, the cause was remanded to the superior court—quoting the language of this court—

"to try the same upon the testimony adduced, and such further evidence as may be produced by the parties, and to determine the priority of rights of the respective claimants, and by decree to establish such priorities and enjoin all parties perpetually from interference with such rights so decreed."

Unchallenged by petition for rehearing or otherwise, the cause was remanded, with the above specific instructions, and was tried by the lower court upon the theory suggested by this court, and, we think, was properly tried.

On the merits, from an examination of the testimony, we do not feel justified in disturbing the findings or conclusions of the court. The number of findings made by the court was not material, as they did not conflict with each other, and all the findings were within the pleadings and the jurisdiction of the court.

The judgment is affirmed.

[No. 4538. Decided October 3, 1903.]

JOHN COLLINS, *Respondent*, v. FIDELITY TRUST COMPANY
OF SEATTLE, Appellant.¹

COMPROMISE—ATTORNEY'S AUTHORITY—SPECIFIC PERFORMANCE—TRIAL—OBJECTION NOT MADE BELOW. In an action for specific performance of a compromise of pending suits entered into by attorneys, an objection that an attorney was not authorized cannot be first raised in the supreme court, and such objection is not saved by an offer of new proofs on a motion for a new trial.

SAME—STATUTE OF FRAUDS—MEMORANDUM. Where a somewhat indefinite memorandum of settlement has been acted upon, and benefits constituting the consideration have been received, a party is estopped from asserting that it is not such as can be enforced by specific performance, or that it is within the statute of frauds.

APPEAL—REVIEW—HARMLESS ERROR—TRIAL—ADVISORY VERDICT—INSTRUCTIONS. Where issues of fact in an equity case are submitted to the jury, errors in instructions or in reading law to the jury are not prejudicial, as the verdict is merely advisory and the case is tried *de novo* on appeal.

NEW TRIAL—POINT NOT RAISED AT TRIAL. A new trial is properly refused upon the mere offer of evidence upon a point not raised at the trial after full opportunity to do so.

APPEAL—REVIEW. Objections not raised below will not be considered on appeal.

Appeal from a judgment of the superior court for King county, Emory, J., entered August 21, 1902, upon the decision and findings of the court and an advisory verdict of a jury rendered in favor of the plaintiff, after a trial on the merits. Affirmed.

Roberts & Leehey, John B. Hart, and M. D. Leehey, for appellant. The court erred after special findings of the jury had been received, and before they were adopted, in refusing to permit appellants to introduce further proofs upon points not submitted to the jury. *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20; *Warr-*

¹Reported in 73 Pac. 1121.

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Citations of Counsel.

ing v. Freear, 64 Cal. 54, 28 Pac. 115; *Vickers v. Buck Stove etc. Co.*, 65 Kan. 97, 68 Pac. 1081; *Kelly v. Kelly*, 126 Ill. 550, 18 N. E. 785; *Hammond v. Morgan*, 101 N. Y. 179, 4 N. E. 328. The attorney was not authorized to make the agreement sought to be enforced. *Livesley v. Pier*, 11 Wash. 268, 39 Pac. 660; *Smith v. Jones*, 47 Neb. 108, 66 N. W. 19, 53 Am. St. 519; *Hadfield v. Skelton*, 69 Wis. 460, 34 N. W. 397. He had no power to bind the corporation to make the assignment without corporate action. *Elwell v. Puget Sound & Chehalis R. Co.*, 7 Wash. 487, 35 Pac. 376; *City El. St. R. Co. v. First Nat. Ex. Bank*, 62 Ark. 33, 34 S. W. 89, 54 Am. St. 282, 31 L. R. A. 535; *Wait v. Nashua Armory Ass'n*, 66 N. H. 581, 23 Atl. 77, 49 Am. St. 630, 14 L. R. A. 356; *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572; *Dewey v. Spring Valley Land Co.*, 98 Wis. 83, 73 N. W. 565. *Gashwiler v. Willis*, 33 Cal. 11, 91 Am. Dec. 607; *Humphreys v. McKissock*, 140 U. S. 304, 11 Sup. Ct. 779; *Sellers v. Greer*, 172 Ill. 549, 50 N. E. 246. The memorandum agreement is too vague and indefinite to be specifically performed. *Dewey v. Spring Valley Land Co.*, *supra*; Story, Eq. Juris. § 767 (12 ed.); *Veth v. Gierth*, 92 Mo. 97, 4 S. W. 432; *Nippolt v. Kammon*, 39 Minn. 372; 40 N. W. 266; *Craig v. Zelian*, 137 Cal. 105, 69 Pac. 853; *Krum v. Chamberlain*, 57 Neb. 220, 77 N. W. 665; *Berry v. Wortham*, 96 Va. 87, 30 S. E. 443; *Venator v. Swenson*, 100 Iowa 295, 69 N. W. 522; *Dunn v. McGovern*, 116 Iowa 663, 88 N. W. 938; *Horner v. Woodland*, 88 Md. 511, 41 Atl. 1079; *Hazelton v. Putnam*, 3 Pin. (Wis.) 107, 54 Am. Dec. 158. The agreement to assign the lease was within the statute of frauds. *Hoover v. Chambers*, 3 Wash. T. 25, 13 Pac. 547; *Bernheimer v. Verdon*, 63 N. J. Eq. 312, 49

Atl. 732; *Lombard Inv. Co. v. Carter*, 7 Wash. 4, 34 Pac. 209, 38 Am. St. 861. And there was no sufficient part performance to take it out of the statute. *Swash v. Sharpstein*, 14 Wash. 436, 44 Pac. 862, 32 L. R. A. 796; *Glass v. Hulbert*, 102 Mass. 24, 3 Am. Rep. 421; *Broughton v. Coffey*, 18 Gratt. (Va.) 184; *Tryce v. Dittus*, 199 Ill. 189, 65 N. E. 220; *Glos v. Wilson*, 198 Ill. 44, 64 N. E. 734.

William Martin and *James F. McElroy*, for respondent. There was a sufficient part performance to take the case out of the operation of the statute of frauds. *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; *Reinhart v. Gregg*, 8 Wash. 191, 35 Pac. 1075; *Peck v. Stanfield*, 12 Wash. 101, 40 Pac. 635; *Underwood v. Stack*, 15 Wash. 497, 46 Pac. 1031; *Langet v. Ross*, 1 Wash. 250, 24 Pac. 443. Where the verdict is advisory error in instructions is not prejudicial. *Peck v. Stanfield*, *supra*; *Scheerer v. Goodwin*, 125 Cal. 154, 57 Pac. 789; *Richardson v. City of Eureka*, 110 Cal. 441, 42 Pac. 965; *Stockman v. Riverside Land etc. Co.*, 64 Cal. 57, 28 Pac. 116.

DUNBAR, J.—This is an action to compel specific performance of an alleged agreement to assign a lease of a portion of the harbor area upon the Seattle waterfront. The lease is from the state of Washington to appellant, Fidelity Trust Company. Appellant corporation was formed in 1894, and to it, respondent Collins conveyed certain property. Several years later, differences arose between him and the management of the corporation, resulting in four lawsuits, entitled “Connor v. Collins,” “Fidelity Trust Company v. Colman,” “Martin v. Fidelity Trust Company,” and “Collins v. Fidelity Trust Company.” In all these cases William Martin, Esq., was

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attorney for respondent Collins, and Messrs. Roberts & Leehey and Will E. Humphrey, attorneys for the corporation. These suits were pending on May 3, 1901, and at that date Mr. Roberts went to the office of Mr. Martin, and they entered into an agreement for the settlement of the same. The agreement is in lead pencil, and is in the handwriting of Mr. Roberts, with the exception, as the appellant claims, of a few words pencilled therein by Mr. Martin; the respondent claiming that the words over which this contest has arisen were written by Mr. Roberts, and were in the first draft of the agreement. The agreement was as follows:

"May 3, 1901.

"Collins surrender 6240 shares stock and trust certificate on Island Co. land.

"Fidelity Trust Co. make special warranty deed to Collins for all real estate conveyed by him to Co. Mtg. of tide land assumed by Collins [& take property in mtg.] Company also to convey to Collins $\frac{1}{2}$ int. in Anacortes judgment. All moneys now on hand belonging to corporation, except Coleman money now in court to go to plaintiff, Collins v. Fidelity Trust Co. to be dismissed, each party to pay own cost.

"Defendants to have Coleman money now in court & to have no other money from plff.

"Defendants to pay no cost of receivership. Martin vs. F. Tr. Co. to be dismissed without cost to either party.

"Conner vs. Collins to be dismissed at without cost to either party.

"F. T. Co. vs. Coleman to be dismissed without costs, & a release of all claims against each other growing out of any of said suits.

"Roberts & Leehey, Attys. for Defts.

"Wm. Martin, Atty. for Plf."

The suits mentioned in the memorandum were dismissed according to the agreement, although objection

thereto that the conditions of the agreement had not been complied with was made by the respondent. The court, however, ruled that the suits should be dismissed under the agreement, and that, if the respondent had any cause of complaint against the appellant growing out of the failure to carry out the provisions of the agreement, he must bring a separate action to obtain his rights. The contest arose over the expression in brackets "& take property in mtg.," the lease being the most valuable part of the property mortgaged, and the appellant refusing to assign it to the respondent, claiming that the words "& take property in mtg." were not in the original agreement as signed by the parties, but that they had been fraudulently entered there since the making of the agreement; while the contention of the respondent is that the words above referred to were in the original agreement, and were written at the same time that the remainder of the agreement was written. This is the main contention in the case.

A jury was impaneled to try certain questions of fact, and found in favor of respondent on the controverted questions. The court also found, that the words, "& take property in mtg." were in the agreement at the time it was signed by the respective attorneys of the parties, and formed a part of said agreement; that the same was mutually entered into by the plaintiff and the defendant; that the plaintiff, John Collins, had complied with all the terms and conditions of said agreement; that he had paid the defendant, and the defendant had received and accepted, the consideration and property it was entitled to receive under its said agreement, and still retains the same. These are all the findings of fact that it is necessary to discuss here. The conclusion was that Collins was entitled to a decree of specific performance directing

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the Fidelity Trust Company to assign and deliver said lease, and enjoining the plaintiff and its officers or agents from in any manner claiming any interest in or to said lease. Judgment was entered accordingly, and the appeal is taken.

An analysis of the voluminous testimony in this case would be unprofitable. It is sufficient to say in that regard that an examination of all the testimony satisfies us that both the special findings of the jury and the findings of the court were justified. This disposes of appellant's second query, under the head of "Matters Involved," viz., was it intended, in the settlement then made of such pending cases, that the lease in controversy should be assigned to respondent? The first contention is that the memorandum agreement, or contract of settlement, was made without the authority of the appellant, and was not subsequently ratified by it. The first answer to the contention is that this point was not raised in the lower court, and, with the exception of jurisdictional questions, cases will be tried here on the theory on which they were tried below. It would be manifestly unjust to a litigant to reverse his judgment on a question which he was not called upon to contest in the lower court by either pleadings or objections, when it might easily happen that, if it had been an issue at the time, he could have successfully met it.

In *Hartigan v. Hoffman*, 16 Wash. 34, 47 Pac. 217, where a deed, executed by an attorney in fact, had been introduced in evidence without objection that no proof of the authority under which it had been executed had been shown, it was held that such objection could not be raised for the first time on appeal, the court saying:

"The specific objection is that no proof was introduced as to the existence of the power of attorney or authority under which said Edson L. Shaw purported to act in exe-

cuting said instrument on behalf of his wife. But, as already noticed, this deed, like the others in respondent's chain of title, was offered and received without objection upon the part of the appellant, and this particular objection, as appears from the record, is urged here for the first time. For this reason we cannot consider it. Had the objection been timely made, respondent might have obviated it by the introduction of other evidence."

Besides, an inspection of the record satisfies us that not only was ample authority given the attorney Mr. Roberts to make the settlement, and every step in the proceedings taken with the knowledge and consent of the appellant, but appellant also ratified said settlement by accepting and enjoying its fruits. It is asserted in appellant's reply brief that the point under discussion was raised in the lower court, and page 411 *et seq.* of the record is cited in support of this assertion. But the record cited, shows that the point was raised on the motion for a new trial after the appearance of new counsel in the case, and not during the investigation of the cause. The offer was made to submit proof that Roberts had no authority from the corporation to make the settlement, which offer, we think, was properly overruled by the court with the remark that the offer and motion were denied upon the ground that evidence was introduced upon the trial upon all the issues under the pleadings by both parties, and that each party had full opportunity to introduce evidence at that time upon all the issues involved in the case.

It is insisted in the third place that, even if the appellant did then agree to assign said lease to respondent, the agreement is not such as can be enforced in an action for specific performance, and falls within the statute of frauds. But the contract was in writing, and, though somewhat indefinite, the parties to it assumed to act in

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accordance with its terms, settlements were made and benefits were received under its terms, which constituted the consideration, and the parties will be estopped from asserting its illegality. *Moore v. Coey*, ante, p. 63, 73 Pac. 768. This outside of the contention raised by the respondent that there was no timely objection to it raised in the trial court—a question which it is not necessary to discuss, though it may be stated that the record shows that the contract was introduced in evidence without objection. The contention in relation to error in instructions, and the alleged misconduct of the attorney for respondent in reading law cases to the jury, if errors, were errors without prejudice, as not affecting the trial of the cause in this court where the case is tried *de novo*. The jury in a case of this kind is only an advisory adjunct to the court, its verdict not binding the trial court or this court, which decides the case upon the testimony. *Peck v. Stanfield*, 12 Wash. 101, 40 Pac. 635. This seems to be the prevailing and reasonable rule.

The eighth contention—that the court erred in not reopening the case—is disposed of by what we have said above. The ninth and concluding contentions—that this action cannot be maintained because the contract lacks mutuality, and because certain alleged stipulations had not been disposed of before the commencement of the action—are neither pleaded nor raised in the court below.

Affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4435. Decided October 3, 1903.]

UNION BOOM COMPANY, *Respondent*, v. SAMISH BOOM
COMPANY, *Appellant*.¹

RECEIVERS—APPOINTMENT TO COLLECT RENTS—GROUNDS—SUFFICIENCY OF SHOWING. In an action to recover the possession and rents and profits of tide lands at the mouth of a river claimed for booming purposes and adversely held by a rival company, the appointment of a receiver *pendente lite* is not warranted by a showing of plaintiff's legal title, that plaintiff had lost a profit of \$15,000 on logs boomed by defendant by being kept out of possession, that defendant's capital stock was only \$2,000, and it had no property from which damages could be collected, where there was no showing that logs would be boomed during the pendency of the suit, or that plaintiff would be entitled to the tolls thereon through contracts with the owners, or that it had the necessary appliances for booming purposes, or that defendant was mismanaging or injuring the property in dispute.

SAME—LEGAL TITLE OF PLAINTIFF. Proof of a valid legal title in the plaintiff is insufficient in itself to warrant the appointment of a receiver without a showing of imminent danger or loss of rents and profits by reason of the mismanagement or insolvency of the defendant.

SAME—DISCRETION—REVIEW. The discretion of the trial court upon appointing a receiver is not absolute, and the proofs will be examined, and the decision reversed if there is a clear preponderance of the testimony against it.

Appeal by defendant from an order of the superior court for Skagit county, Joiner, J., entered September 15, 1902, appointing a temporary receiver upon the application of plaintiff in an action of ejectment, after a hearing on oral testimony and affidavits. Reversed.

Million & Houser, for appellant.

Elihu R. Sherman, for respondent.

¹Reported in 74 Pac. 53.

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ANDERS, J.—On March 13, 1900, the appellant was organized as a corporation under the laws of this state relating to the organization, management, and control of boom companies, and ever since said date has been doing business as such in Samish river and tide waters adjacent thereto. Its boom works are located near the mouth of the river, and partly on tide lands, which, at the time the company filed its articles of incorporation and plat or survey of appropriation, as required by law, and commenced business, belonged to the state. On or about March 13, 1901, the respondent was also duly organized as a boom company under the laws of this state, and in due time it filed its plat of appropriation, which, as we understand it, covers the territory occupied and used by the appellant, and which was designated on its plat of appropriation. The appellant's works are situated on and along the north shore or bank of the river. On May 23, 1901, the respondent purchased from the state the tide lands occupied and used by appellant on the north side of the river, as well as the tide lands on the south side thereof at its mouth, for the purpose, it is asserted, of using the same for a boom site; but it is admitted that it has done no business as a boom company since its organization. It appears from the evidence that all the timber which has come down the Samish river since the incorporation of the appellant has been caught, held, and rafted by that company, and that the greater part thereof has been the timber of two of the officers and stockholders of the company, the residue having been taken charge of and handled under contract with the owners.

In the month of April, 1902, the respondent herein brought this action against the appellant to recover the possession of the tide lands occupied and used by the lat-

ter. The complaint alleges, in substance, among other things, that the plaintiff has a valid subsisting interest in the following described real estate (describing it), by virtue of a contract with the state of Washington for the purchase of the same, duly executed by the proper officer of the state, and delivered to plaintiff on May 23, 1901; that ever since May 23, 1901, the plaintiff has had, and now has, the right to the immediate possession of said real estate, and at no time in the complaint mentioned has the defendant had or acquired any interest in, or been entitled to the possession of, said real estate, or any part thereof; that the defendant is, and since May 23, 1901, has been, in possession of and using and occupying said real estate unlawfully, without right, and adversely to the plaintiff, and has been withholding the possession thereof from the plaintiff; that during all the time since May 23, 1901, the plaintiff has been kept out of the possession of said real estate, and has thereby lost the use and occupation thereof, and the rents and profits thereof, and defendant has had the use thereof, and the rents and profits therefrom, to the damage of plaintiff \$15,000.

The other allegations of the complaint are to the effect that the plaintiff and defendant are corporations organized and existing under and by virtue of the laws of the state of Washington. The prayer of the complaint is for a judgment and decree that plaintiff has a valid subsisting interest in, and is entitled to the possession of, the real estate described in the complaint, and that the defendant has no interest therein; that plaintiff recover the possession of said property; and for \$15,000 damages, together with its costs and disbursements.

It will thus be seen that the plaintiff is endeavoring, in its action of ejectment, to recover not only the possession

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of real estate, but also the rents, issues, and profits thereof. But we have no occasion, in this proceeding, to determine any question of pleading or practice. We have stated the contents of the complaint simply for the purpose of making more plain than they otherwise would appear the matters which were before the lower court at the time the order appealed from was made.

At the time of filing its complaint, the respondent filed the affidavit of its president, and thereupon asked the court to appoint a receiver of the property described in the complaint to take possession of, manage, and care for the same during the pendency of the action. On May 20, 1902, the application for the appointment of a receiver came on for hearing, and, after the testimony on the part of respondent was closed, appellant challenged the sufficiency of the complaint, application, and proof, to authorize the appointment of a receiver, and, upon the same being overruled, introduced its testimony in opposition to the application. On the trial the affidavits filed by the respective parties were by stipulation treated as testimony in the cause, and they have been transmitted to this court as part of the record. At the close of the testimony appellant again challenged the complaint and the legal sufficiency of the evidence. The court overruled these objections, and thereafter made and entered an order appointing a receiver, and directing the receiver so appointed to take charge of the property, and manage and control the same, subject to the order of the court, until final judgment in the action. The defendant has appealed from the order and ruling above mentioned, and alleges that the court erred in making the same.

It is contended by the appellant that neither the complaint nor the affidavit filed by the respondent at the time

it applied for the appointment of a receiver states facts sufficient to justify the action of the court in appointing the receiver. There is no allegation, as we have seen, in the complaint itself, of any fact or facts authorizing the appointment of a receiver; and, if the affidavit filed by the respondent in support of its application does not set forth sufficient facts for such appointment, it would seem to follow that the objections of the appellant to the application should have been sustained.

The only material allegations in the affidavits presented by the respondent, except those showing respondent's interest in, and ownership of, the lands in question, are, that plaintiff (respondent) became entitled to possession of said lands on May 23, 1901, and has several times demanded possession thereof from the defendant (appellant); that since May 23, 1901, about thirty million feet of lumber and timber have come down the Samish river across said lands, and plaintiff would have been prepared to boom, catch, sort, hold, and raft said timber, had it not been kept from the possession of said lands by defendant; that plaintiff would have made a net profit of at least \$15,000 from holding, assorting, booming, and rafting said timber, had it not been kept from the possession of said lands by defendant; that deponent believes that defendant has absolutely no rights on said lands, and is holding possession of the same with the intention of keeping plaintiff out of the possession thereof as long as possible, without intending to make any compensation for their use; that defendant has a capital stock of only \$2,000, and deponent can discover and knows of no property that it has from which plaintiff could collect the damages it has already sustained in the premises; and, if defendant continues in possession of said property during the pendency of this

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action, plaintiff will be still further damaged, and said damage will be entirely irreparable, as plaintiff will have no way of recovering the same.

It must be borne in mind that respondent's application was for the appointment of a receiver *pendente lite*, and it seems to us that this affidavit is clearly insufficient of itself, or as supplemented by the complaint, to warrant the appointment of a receiver. It will be observed that it does not show how or why plaintiff will sustain any damage during the pendency of the action, the allegation regarding such damage being merely that, "if defendant continues in the possession of said property during the pendency of this action, plaintiff will be still further damaged, and said damages will be entirely irreparable, as plaintiff will have no way of recovering the same." This is merely a statement of a legal conclusion, without any averment of facts upon which such conclusion was predicated, and conclusions are no more permissible in affidavits, such as that now under consideration, than they are in ordinary pleadings. High, Receivers (3d ed.), §§ 88, 89.

Nor is it alleged in this affidavit that any timber will come down the river to be caught and boomed, pending the action, or that any tolls or charges will be collected in which respondent is interested, or to which it will be entitled. And a receiver *pendente lite* manifestly could not take charge of tolls earned and received by appellant prior to such receiver's appointment. Neither is it shown with any degree of certainty that the respondent would have received the \$15,000 mentioned in the affidavit, even if it were conceded that that matter was a proper one for consideration upon the hearing of the application. As a general rule, a boom company in this state can only collect toll on timber which passes into its boom by virtue of an

agreement with the owner or by his consent. *Gray's Harbor Boom Co. v. McAmman*, 21 Wash. 465, 58 Pac. 573; *Washougal River, etc. Co. v. Skamania Logging Co.*, 23 Wash. 89, 62 Pac. 450. And there is no showing in the affidavit in question that the respondent would have had the right to collect any tolls during the pendency of the action by reason of any contract, either on its part, or that of the appellant; and, moreover, in order to enable the respondent to collect tolls at all, for booming or rafting timber, it would first be necessary for it either to erect the necessary appliances itself, for booming purposes, or to take charge of and manage the boom works already constructed and in use by appellant. It could not do the latter directly, and it therefore applied to the court for the appointment of a receiver to manage the works and business of the appellant. And in its affidavit it failed to show or to allege that the appellant was mismanaging, wasting, or injuring the property in dispute. We think the affidavit was insufficient as a basis for the appointment of a receiver, and that the objection thereto should have been sustained.

It is claimed, however, by the learned counsel for the respondent, that at the final hearing of the application for the appointment of a receiver the respondent made a strong showing of title to the property, with a reasonable probability that it will succeed in its ejectment suit, and that there was imminent danger to the property, or to its rents and profits, unless the court should interpose, and that these two conditions, according to the decision of this court in *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81, 50 Pac. 1008, fully warranted the conclusion of the superior court.

No doubt the showing as to the first "condition" was sufficient, but we think the great preponderance of the

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evidence is to the effect that there was no imminent danger either to the property or the rents and profits recoverable by the respondent. There was no showing whatever that the *land* was being, or would be, injured by the appellant; nor was it satisfactorily shown that appellant was, or is, unable to pay the rental value of the premises during the time of its occupancy of the same, which would, in any event, be the measure of damages. In fact, the proof tends strongly to establish the fact that appellant is able to respond to any judgment that may be rendered against it for the rental value of the property. And therefore there was no necessity for the appointment of a receiver. In actions for the possession of real property, the appointment of a receiver amounts, "in effect to a complete ouster of the defendant, by taking away from him the subject-matter of the litigation, without trial or judgment. And in such case, a valid legal title in the plaintiff is not of itself a sufficient ground for the relief." High, Receivers, § 575.

In an action of this character, a receiver may properly be appointed where there is imminent danger of loss of rents and profits by reason of the mismanagement and insolvency of the defendant in possession, and where the legal title to the property appears to be in the plaintiff. High, Receivers, § 546. Under our statute a receiver may be appointed in an action at law when it is shown that the property, fund, or rents and profits in controversy, are in danger of being lost, removed, or materially injured, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties. Bal. Code, § 5456, subd. 3 and 4. And this court has often held, in effect, that a receiver will not be appointed except when it is necessary either to prevent fraud, protect the property in liti-

gation from injury or destruction, or prevent its removal during the pendency of the action. See *Brundage v. Home Savings & Loan Ass'n*, 11 Wash. 277, 39 Pac. 666; *Sengfelder v. Hill*, 16 Wash. 355, 47 Pac. 757, 58 Am. St. 36; *Spokane v. Amsterdamsch Trustees Kantoor*, 18 Wash. 81, 50 Pac. 1008.

But it is insisted by counsel for respondent that, under the statute above mentioned, the appointment of a receiver is a matter committed to the sound discretion of the trial court, and such appointment will not be disturbed on appeal unless it appears by a clear preponderance of the evidence to have been unwarranted; and *Cameron v. Groveland Imp. Co.*, 20 Wash. 169, 54 Pac. 1128, 72 Am. St. 26, and *Roberts v. Washington Nat. Bank*, 9 Wash. 12, 37 Pac. 26, are cited in support of his contention. And it is true the decisions in those cases are substantially in accordance with the propositions announced by counsel. In the case last cited the court said,

"But the appellate court must examine such proofs for the purpose of determining whether or not there is such a clear preponderance against the determination of the lower court."

and this language was quoted and approved in the *Cameron* case above cited. That the correct rule was thus announced can hardly be disputed or questioned, for otherwise an appeal of this character would be but a mere form, without substance or efficacy. The discretion vested in the court, in a proceeding of this character, is to be exercised only for the purpose of securing "ample justice to the parties." The court's discretion is not absolute or arbitrary, but a sound judicial discretion, in view of all the facts and circumstances of the particular case, "exercised for the promotion of justice and the protection of rights, where no other adequate remedy exists." Under

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the facts disclosed by the record, we do not think the trial court was warranted in appointing a receiver to take possession of the premises in controversy before trial and judgment.

There are some questions discussed in the briefs of counsel which we do not deem it necessary or proper to consider on this appeal, as they more properly relate to matters pertinent to the main case.

The appellant has instituted an action to condemn the lands in controversy for booming purposes, and the trial court will probably suspend the action for the recovery of the possession of the premises until the condemnation proceedings are terminated, in accordance with the usual practice.

The order appealed from is reversed.

FULLERTON, C. J., and MOUNT, J., concur.

DUNBAR, J., concurs in the result.

[No. 4421. Decided October 6, 1903.]

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A. J. TOWNER, *Respondent*, v. DANIEL RODEGEB, *Appellant*.¹

PUBLIC LANDS—HOMESTEAD—EXEMPTION FROM DEBTS—HEIR'S PREFERENCE RIGHT TO ENTER—ADMINISTRATOR'S SALE—VALIDITY. Where a settler upon unsurveyed public lands dies without heirs who are citizens of the United States, his administrator cannot sell the improvements and right of possession to pay debts and expenses of administration, but the land is again open to settlement, since heirs do not succeed by right of inheritance, but only by virtue of a preference as new homesteaders, if qualified, and the homestead is exempt from debts.

SAME—SETTLER ON UNSURVEYED LANDS—EXEMPTIONS. The exemption from debts contracted prior to patent applies with equal

¹Reported in 74 Pac. 50.

force to improvements on unsurveyed land before entry, and after as well as before the death of the settler, and to administrators' as well as execution sales.

ADMINISTRATOR'S SALE—RIGHTS OF PURCHASER. The rule of *caveat emptor* applies to administrator's sales.

Appeal by defendant from a judgment of the superior court for Cowlitz County, A. L. Miller, J., entered April 14, 1902, enjoining interference with plaintiff's possession of public lands, as prayed in the complaint, after sustaining a demurrer to affirmative defenses in defendant's answer. Affirmed.

A. F. Flegel, for appellant. He contended, *inter alia*, that the possessory rights of a settler, together with his improvements upon public lands, are personal property and assets in the hands of the administrator. *Maish v. Arizona*, 164 U. S. 599, 17 Sup. Ct. 193; *Burch v. McDaniel*, 2 Wash. T. 58, 3 Pac. 586; *Pelham v. Wilson*, 4 Ark. (4 Pike) 289; *Grover v. Hawley*, 5 Cal. 485; *Bowman v. Torr*, 3 Iowa 571; *Stewart v. Chadwick*, 8 Iowa 463; *Corbett v. Berryhill*, 29 Iowa 157; *Bower v. Kee-secker*, 14 Iowa 301.

Magill & Magill and *J. N. Percy*, for respondent.

PER CURIAM.—Respondent brought this suit and alleged, that he was in possession of a certain forty-acre tract of unsurveyed government land, which was formerly occupied by one Morrison as a squatter; that respondent has been in possession of the land since about October 1, 1898; that he has partially fenced the same, has continuously improved it since said date, intends to take it as a homestead, has qualified under the laws of the United States to do so, and is entitled to the possession thereof; that on August 26, 1898, said Morrison died intestate and without heirs, and soon thereafter respondent entered

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into possession of the land, and commenced the cultivation and improvement thereof as aforesaid; that on January 19, 1902, one Van Name, acting as administrator of the estate of said Morrison, attempted to sell, at public administrator's sale, the said improvements and the right of possession of said land, to the appellant herein; that thereafter the appellant, by stealth and in the absence of respondent, broke open the house upon the land, entered therein, removed respondent's goods therefrom, entered upon the land itself, and refuses to depart therefrom; that appellant has cut timber on the premises, thrown down fences built by respondent, and threatens to cultivate the land and drive respondent therefrom; that respondent has not been absent from the premises at any time for a longer period than five days, and then only at rare intervals, since he entered into possession thereof; and that he has spent large sums of money and much labor in the improvement and cultivation of the land. An injunction is prayed, restraining appellant from committing waste upon the premises, and from in any manner interfering with respondent's possession and enjoyment thereof. The prayer also asks that respondent shall be adjudged to have the sole right of possession of said land, and that so much of said administrator's sale as attempted to convey the right of possession shall be declared null and void.

Appellant answered the complaint, denying many allegations thereof, and alleged affirmatively, among other things, that said Morrison died intestate and without heirs who were citizens of the United States; that at the time of his death he was indebted to various persons; that ten or twelve years prior to his death he settled upon the land described in the complaint, with the intention of claiming it as a

homestead, he being qualified under the laws of the United States so to do; that after his settlement thereon he proceeded to improve the land, built a dwelling house, barn, and wood shed, and cleared, fenced, plowed, and cultivated about twenty-five acres of the tract; that the said improvements and the right to the possession of said land constituted the whole estate left by said Morrison, except a few articles of personal property of small value. The facts concerning the probate proceedings authorizing the aforesaid sale, and the fact of the sale itself, are also alleged. It is further averred that appellant took possession of the land quietly and peaceably, and under and by virtue of said administrator's sale. The answer contains other allegations which need not be set out here, and concludes with a prayer for a restraining order prohibiting respondent from interfering with appellant's quiet enjoyment of the premises, and for a judgment quieting appellant's title in and to the right of possession of the land.

Respondent demurred to the affirmative answer on the ground that it does not state facts sufficient to constitute a defense to the cause of action set out in the complaint, and also upon the further ground that the court has no jurisdiction of the subject-matter of the defense set out in the answer. The demurrer was sustained. Appellant elected to stand upon his answer, and refused to plead further. Thereafter the court entered judgment to the effect, that such attempted sale by the administrator of the right to possession of the land was void, and that appellant acquired no right to such possession by virtue of such sale; that respondent is, and at all times since October 1, 1898, has been, entitled to the possession of the land; and that appellant shall be restrained from interfering with respondent's possession and enjoyment thereof. The cause is here on appeal from said judgment.

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Briefly stated, the facts challenged by the demurrer to the answer are, that one duly qualified settled upon unsurveyed government land with the intention of taking it as a homestead, and afterwards died intestate, without heirs who are citizens of the United States. Subsequently another, also duly qualified, took possession of the land with the intention of taking it as a homestead, and thereafter resided upon it and improved and cultivated it for that purpose. The question of law presented is, can the administrator of the deceased settler sell the latter's improvements and his right to the possession of the land for the purpose of paying debts and expenses of administration, and vest in the purchaser the right to oust the occupant?

The homestead law vests the rights in the land in the claimant himself, for his exclusive benefit, and if he die before patent issues, leaving no widow, then in his heirs or devisees, if they be at the time citizens of the United States. Rev. Stat. U. S., §§ 2290, 2291. The alien heirs are incompetent to make proof and secure title to a homestead. *Agnew v. Morton*, 13 Land Dec. Dept. Int. 228. The answer in the case at bar alleges that the deceased homesteader left no heirs who were citizens of the United States. They are, therefore, incompetent to make the necessary proof and secure title as heirs of the deceased.

There is no authority in the land laws for an executor or administrator to consummate the inchoate claim of a deceased homesteader for the benefit of the creditors. *Stinson v. South & North Alabama R. R. Co.*, 9 Land Dec. Dept. Int. 599. If a homestead claimant dies before patent issues, or before the right to demand a patent has accrued, the land does not become a part of his estate. Upon

his death, all his rights under the homestead entry cease, and his heirs become entitled to a patent, not because they have succeeded to his equitable interest, but because the law gives them preference as new homesteaders, and allows them the benefit of the residence of their ancestor upon the land. *Gjerstadengen v. Van Duzen*, 7 N. D. 612, 76 N. W. 233, 66 Am. St. 679; *Chapman v. Price*, 32 Kan. 446, 4 Pac. 807. The same principle, under similar statutory provisions, is applied in the case of death of a preëmptor. The subsequently perfected title shall inure to the benefit of the heirs, and can neither be devised by the preëmptor, nor sold in satisfaction of his debts or expenses of administration. *Wittenbrock v. Wheadon*, 128 Cal. 150, 60 Pac. 664, 79 Am. St. 32.

"The claim of a squatter on public land, and his improvements made on the land during his occupancy, are not assets." 11 Am. & Eng. Enc. Law, 845 (2d ed.); citing *Holton v. Holton*, 99 Pa. 250, 25 S. E. 468, and *Bowen v. Burnett*, 1 Pin. (Wis.) 658.

The last cited case is directly in point, but an examination of the first one cited fails to disclose what was actually involved. The decision is a mere memorandum only, to the effect that an administrator is under no duty to administer, as a portion of his intestate's estate, property which does not belong to the latter. It may be fairly presumed, however, that the editor of the above quoted text was advised that the property referred to in the decision was "the claim of a squatter on public land." Moreover, a homestead cannot be made liable for debts contracted before patent issues. Rev. Stat. U. S., § 2296. *Barnard v. Boller*, 105 Cal. 214, 38 Pac. 728; *Wallowa Nat. Bank v. Riley*, 29 Ore. 289, 45 Pac. 766, 54 Am. St. 794. This court has recognized the above to be the invariable rule as to the enforcement of debts by any un-

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willing or involuntary appropriation, as by way of execution or attachment; the exception to the rule being that a voluntary incumbrance, as a mortgage, may be enforced. *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. 726.

If the homestead itself, with title acquired, cannot be subjected to liability for debts contracted before the issuance of patent, it would seem to follow with equal force that the homesteader's mere right to possession of land, not even entered, together with his improvements thereon, is likewise exempt from such liability. If execution for debts contracted before patent cannot be enforced against a homestead, either acquired or inchoate, it follows that such debts cannot be enforced against it by the processes of administration, as was attempted to be done in this case. If the improvements and right of possession of the settler when living cannot be sold to satisfy his debts, the mere fact of death does not change the principle.

It therefore seems to be the policy of the law to guard homestead rights for the benefit of the entryman himself, and, in case of his death before patent, for the benefit of his heirs. Whatever rights survive the death of the homesteader belong to the heirs, and not to the estate of the deceased. The heirs do not succeed to such rights by inheritance, but by virtue of the law which merely grants to them preference rights. If they fail to exercise those rights, or if, as in this case, there are no heirs capable, as citizens of the United States, of succeeding to such rights, then there is no one else to whom any preference right survives, and the land is open, as a part of the public domain, for occupancy by any qualified homesteader. The administrator, as such, succeeds to no rights in the homestead, for the reason that these are reserved for the heirs,

and the law does not invest the administrator with any rights therein simply because there are no heirs.

Appellant cites *Burch v. McDaniel*, 2 Wash. T. 58, 3 Pac. 586, and urges that case as authority for selling the possessory rights of a homesteader by the administrator. That case seems to have been decided upon the strength of the provision of former section 2269 of the Revised Statutes of the United States. That section has since been repealed by the act of March 3, 1891. See 2 U. S. Compiled Statutes of 1901, p. 1379. That section provided, that upon the death of any person entitled to claim benefits of the preemption laws, before consummating his claim, his executor or administrator might file the papers necessary, and that the entry should be in favor of the heirs of said deceased preemptor; that the patent thereon should cause the title to inure to such heirs in the same manner as if their names had been specifically mentioned.

The court held under that law, that the right of possession of preempted land to which title was inchoate passed on the death of the preemptor to his administrator; that the right of possession thus acquired was subject to a trust which required the administrator to perfect title in favor of the heirs, if the estate was in such condition as to enable him to do so, and if the interests of the heirs and all things considered so demanded; that he might, also, under such trust, if the interests of the heirs so demanded, sell the right of possession for their benefit instead of perfecting title in their behalf. But it was expressly held that such sale must be for the benefit of the heirs, and not for creditors; that the administrator stood in possession as representing the ancestor for the benefit of the heirs, and not as representing him for the benefit of creditors and heirs alike. Thus it will be seen that the case cited

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is authority for sale by the administrator only when it is for the benefit of the heir. Section 2292, Revised Statutes of the United States, provides for such a sale by the administrator for the benefit of infant children of the deceased, but it must be for their benefit, and for no other purpose. There seems to be no authority for the administrator to sell for the benefit of the creditors.

We conclude, therefore, that the attempted sale in this case was void. Appellant may have purchased in good faith, but the rule of *caveat emptor* applies to a purchaser at an administrator's sale. *Gjerstadengen v. Van Duzen*, *supra*; *Smith v. Wildman*, 178 Pa. St. 245, 35 Atl. 1047, 36 L. R. A. 834, 56 Am. St. 760; *Lindsay v. Cooper*, 94 Ala. 170, 11 South. 325, 16 L. R. A. 813, 33 Am. St. 105.

We think the demurrer to the answer was properly sustained, and the judgment is affirmed.

[No. 4528. Decided October 6, 1903.]

B. H. DENNIS, *Appellant*, v. FIRST NATIONAL BANK OF SEATTLE, *Respondent*.¹

PARTNERSHIP—CONTRACT OF INDIVIDUAL MEMBER—ATTORNEYS—SERVICES. One member of a law firm may contract for employment without disclosing the partnership, the general principles of partnership applying, and such a contract on behalf of the firm is shown entitling the firm to sue thereon where the firm entered an appearance in the case and corresponded with the client in reference to a discharge and services.

SAME—PLEADING—VARIANCE. Under a complaint alleging an express contract for employment made by a firm of attorneys there is no variance warranting a nonsuit where the proof shows a contract made by one member for the benefit of the firm, but without disclosing the partnership.

¹Reported in 73 Pac. 1125.

Appeal from a judgment of the superior court for King county, Griffin, J., entered June 30, 1902, dismissing the action upon granting a motion for a nonsuit. Reversed.

Hawley & Huntley, for appellant.

Struve, Allen, Hughes & McMicken, for respondent. The evidence showed an express contract with one member of the firm, which excludes an implied contract with others. *Walker v. Brown*, 28 Ill. 378, 81 Am. Dec. 287; *Ostrander v. Capital Inv. etc. Ass'n* (Mich.), 89 N. W. 964. The variance was material. *Thompson v. Stetson*, 15 Neb. 112, 17 N. W. 368; *Phillips v. Pennywit*, 1 Ark. 59; *Lost Lake Lumber Co. v. Smith*, 29 Wash. 713, 70 Pac. 134; *Black v. Struthers*, 11 Iowa 459.

PER CURIAM.—The present action was begun in the superior court of King county by appellant against respondent on an express contract for legal services, alleged to have been rendered by H. C. Dillon and E. T. Dunning, under the firm name and style of Dillon & Dunning, to respondent, appellant suing as their assignee. The cause came on for trial before the court and a jury. After submission of the evidence, the court, on motion of respondent, nonsuited appellant, and entered a judgment of dismissal against him, from which an appeal has been taken to this court.

The error alleged by appellant is the granting of the nonsuit and rendering the judgment of dismissal. From the record it appears that the trial court's decision was based on the claim that there was a variance "between the allegations of the complaint and the evidence produced, in that the complaint alleged a contract between the defendant, and H. C. Dillon and E. T. Dunning as copartners under the firm name and style of Dillon & Dunning, while

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the evidence showed a contract between the defendant and E. T. Dunning only." The facts appearing at the time the nonsuit was granted, which bear upon that question, are in substance these: Respondent, on or about May 11, 1895, in Los Angeles county, California, recovered a judgment against Kate Calkins and C. C. Calkins for \$1,520.50, which remained uncollected when E. T. Dunning, of the firm of Dillon & Dunning, first appeared in the transaction. One S. P. Mulford was the attorney of respondent in the action in which such judgment was recovered, and appeared therein as the attorney of record. Dillon and Dunning were partners practicing law at the city of Los Angeles in the years of 1897 and 1898. In the fall of 1897 the respondent, the First National Bank of Seattle, addressed to E. T. Dunning a letter with reference to employing him as its attorney to collect the above judgment. Considerable correspondence followed between Dunning and respondent relating to the matter of collecting this judgment, in which Dunning wrote about his services, wherein no reference is made to his partner, Dillon. Under date of November 23, 1897, respondent, at the city of Seattle, wrote Mr. Dunning at Los Angeles as follows (omitting date and address):

"Dear Sir: I have yours of the 19th in relation to the Calkins matter, and am writing Mr. Mulford today to turn the papers over to you. Your terms of 50 per cent of the claim, if collected, is satisfactory to us.

"Yours truly, L. Turner, Cas."

Some later correspondence was had between Dunning and respondent, but it is without special significance, as we view the matters in controversy. After the date of the letter of November 23, 1897, to Dunning, on stipulation between attorney Mulford, representing respondent, Dillon & Dunning were substituted as its attorneys by order of the

court in Los Angeles county, and some effort was made by them to collect the judgment. In November, 1898, letters and telegrams passed between the respondent and Dillon & Dunning with reference to their discharge as attorneys for the bank, and for having Mulford reinstated as attorney for the bank in their stead. On November 12, 1898, respondent sent the following telegram to Dillon & Dunning:

"Seattle, Wn., Nov. 12, '98.

"Dillon & Dunning, Los Angeles, Cal.

"Substitute S. P. Mulford as our attorney in suit this bank against C. C. and Kate A. Calkins. Send bill for services.
First National Bank of Seattle."

This telegram was received by Dillon & Dunning on the day of its date. On November 28th following, on motion of S. P. Mulford, the order of substitution was made in accordance with the telegram.

It seems to us that the facts disclosed show nothing more than the making of a contract by one member of a firm in behalf of the firm. Such contracts are not void, nor are they the contracts of the individual member of the firm making them. At common law the rule was well established that, where a contract not under seal is made by an agent in his own name for an undisclosed principal, either the agent or principal may sue on it; the defendant having the same rights as if the agent had been the contracting party. The rule was most frequently applied to sales and transactions of agents, brokers, and partners. *Sims v. Bond*, 5 Barn. & Adol. 389.

"The contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own

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name was acting for him. This proof does not contradict the writing; it only explains the transaction." *Ford v. Williams*, 21 How. 289.

See *Eastern R. R. Co. v. Benedict*, 5 Gray 561, 66 Am. Dec. 384; *Blanchard v. Page*, 8 Gray 300; *Hunter v. Giddings*, 97 Mass. 44, 93 Am. Dec. 54; *Higgins v. McCrea*, 116 U. S. 680, 6 Sup. Ct. 557.

1 Lindley on Partnership, p. *275, uses this language: "This doctrine is constantly applied in partnership cases; it happens every day that a firm sues on a contract entered into on its behalf by one of its members, and it is not by any means necessary that the person dealing with him should have been aware that the one partner was acting on behalf of himself and other people." This principle applies to dormant and ostensible partners, with this distinction: "But a dormant partner never need be joined as a coplaintiff in an action on a contract entered into with the firm or with one of its members." 1 Lindley on Partnership, p. *276. This rule is in consonance with Balinger's Code, § 4824: "Every action shall be prosecuted in the name of the real party in interest, except as is otherwise provided by law."

Within the ordinary scope of their business or profession, we think the general principles of the law of partnership apply to lawyers with the same force that they do to partnerships engaged in other occupations or professions. *Jackson v. Bohrman*, 59 Wis. 422, 18 N. W. 456. In *Eggleston v. Boardman*, 37 Mich. 19, it was said:

"The retainer of one member of a firm is a retainer of all the members, and unless otherwise stipulated the cause might be conducted and argued by any one of them."

If this be correct, it must logically follow that the firm may sue and recover for services rendered. We are of the opinion, taking into consideration all the correspond-

ence, the stipulation, orders for substitution of attorneys, as well as the telegrams which passed between respondent and Dillon & Dunning, that the testimony on the part of appellant tended to show that the actual contract of employment was made with Dunning for the benefit of Dillon & Dunning, that there was no material variance between allegations and proof in that particular, and that the trial court erred in granting the nonsuit and dismissing the case.

The judgment of the superior court is reversed, and the cause is remanded for a new trial.

[No. 4375. Decided October 8, 1903.]

HENRY McLEAN, *Appellant*, v. FLOYD H. ROLLER,
Respondent.¹

APPEAL—BOND—AFFIDAVIT OF SURETIES. The fact that the principal in an appeal bond, as notary public, took the affidavits of the sureties does not affect the sufficiency of the bond.

ADMINISTRATION—PRIORITY—WHO ENTITLED TO—DISQUALIFICATION OF HUSBAND. Under Bal. Code, § 6141, conferring the prior right to administration upon the surviving husband, or upon such person as he may request to be appointed, the husband, although convicted of a felony and himself disqualified to act, may designate the person entitled to the appointment.

SAME—WAIVER OF RIGHT—TIME FOR ASSESSING PREFERENCE. The neglect of the person entitled to letters of administration to petition therefor for more than forty days after the death of the intestate waives the right to priority, under Bal. Code, § 6141, and confers upon the court discretionary power to appoint any suitable person, and where two suitable persons subsequently apply, a selection made without reference to former priorities will not be disturbed on appeal.

SAME—JURISDICTION—SUFFICIENCY OF APPLICATION—AFFIDAVIT AS TO HEIRS—FAILURE TO FILE. The failure of the applicant for

¹Reported in 73 Pac. 1123.

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letters of administration to file with his petition an affidavit, stating the names and residences of the heirs, is not a jurisdictional defect, since the same section requires the jurisdictional facts to be stated in the petition, and where this is done and the affidavit is filed at the time of the hearing the appointment is authorized.

Appeal from an order of the superior court for Skagit county, Joiner, J., entered May 27, 1902, upon a hearing of applications for letters of administration. Affirmed.

Henry McLean, appellant (*Thomas Smith*, of counsel),
pro se.

Phillips & Peringer, for respondent.

ANDERS, J.—This is an appeal from an order of the superior court in and for Skagit county, appointing Floyd H. Roller, and refusing to appoint Henry McLean, administrator of the estate of Emma Roller, deceased.

Emma Roller died intestate in Skagit county, Washington, on May 3, 1901, leaving an estate in said county consisting of her interest in the community property, real and personal, of herself and her husband Edward W. Roller. On May 15, 1902, Floyd H. Roller, a son of the deceased, filed his petition for letters of administration upon the estate of the said deceased; and on May 17, 1902, Henry McLean filed with the clerk of said superior court his petition for appointment as administrator of said estate. The application of the said Roller was set for hearing on May 26, 1902, and on that day he filed his affidavit stating the names and places of residence of the heirs of the said decedent, Emma Roller, which he neglected to file at the time he filed his petition.

On the day last above mentioned, the said McLean filed in said court the request of Edward W. Roller, the surviving husband of Emma Roller, that Henry McLean be appointed administrator of the estate of his deceased wife.

This request was dated November 25, 1901. At the time this request and petitions for letters of administration were filed, Edward W. Roller was confined in the state penitentiary under sentence for a felony committed in Skagit county, and at the time he executed the request for the appointment of McLean, he was under arrest and charged with the commission of said felony. At the time he filed his petition, Mr. McLean also filed his affidavit, correctly stating the names of all the heirs of the deceased, but incorrectly stating the places of residence of two of such heirs.

Both applications were heard at the same time, on May 27, 1902, that of petitioner Roller having been continued by the court to that date. And after considering the evidence and the arguments of counsel for the respective parties, and making and filing its findings of fact and conclusions of law, the court granted the petition of Floyd W. Roller, and accordingly made and entered an order appointing him administrator of said estate. From that order, this appeal is prosecuted. The facts above stated were found by the trial court, and are accepted by both parties as established facts in the cause.

It appears that the principal in the appeal bond, as notary public, took the affidavits of the sureties attached to the bond, and for that reason and on that ground the respondent moves to dismiss the appeal in this cause. In *Spokane & Idaho Lumber Co. v. Loy*, 21 Wash. 501, 58 Pac. 672, one of the sureties in the appeal bond, being a notary public, took the affidavit of the other sureties required by statute, and for that reason it was contended that the bond was insufficient, and that the appeal should be dismissed. In relation to the motion, which was denied, we said:

"The statute (Bal. Code, § 248) provides that 'every duly qualified notary public is authorized in any county

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in this state . . . to take depositions and affidavits and administer all oaths required by law to be administered;' and, in our opinion, the notary who took the affidavits of two of his cosureties was not disqualified, under the statute, by any interest he himself had in the bond. The substance of the affidavit of the sureties in such bonds is prescribed by law, and the act of the notary in administering the oath is purely ministerial, and is not affected by his interest therein."

For the reasons stated in the opinion in that case, the motion to dismiss this appeal is denied.

There is no controversy as to the facts in this case, and the sole question for determination is whether the conclusions and order of the court are warranted by the facts above stated. Our statute provides that

"Application for letters of administration shall be made by petition in writing, signed by the applicant or his attorney, and filed in the superior court, which petition shall set forth the facts essential to giving the court jurisdiction of the case, and such applicant, at the time of making such application, shall make an affidavit, stating, to the best of his knowledge and belief, the names and places of residence of the heirs of the deceased, and that the deceased died without a will." Bal. Code, § 6142.

The next preceding section provides that

"Administration of the estate of a person dying intestate shall be granted to some one or more of the persons hereinafter mentioned, and they shall be respectively entitled in the following order: 1. The surviving husband or wife, or such person as he or she may request to have appointed; . . . Provided, that if the persons so entitled or interested shall neglect for more than forty days after the death of the intestate to present a petition for letters of administration . . . then the court or judge may appoint any suitable and competent person to administer such estate."

"When a petition praying for letters of administration is filed, the clerk must give notice thereof, by causing notices to be posted in at least three public places in the county, one of which must be at the place where the court is held, containing the name of the decedent, the name of the applicant, and the time at which the application will be heard. Such notice must be given at least ten days before the hearing." *Id.* § 6144.

No person is qualified, under our law, to *act* as administrator, who has been convicted of any felony, or of a misdemeanor involving moral turpitude; and, if letters of administration have been issued to any person who is subsequently convicted of either of the said offenses, the court having jurisdiction is required to revoke such letters. *Bal. Code*, § 6195.

The first point made by appellant is that the court below erred in denying the request of E. W. Roller, the surviving husband of the deceased, to have appellant appointed as administrator of his deceased wife's estate, even if he (Roller) was, at the time of the hearing, himself disqualified to act as administrator, by reason of his having been convicted of a felony. This question has frequently been considered by the supreme court of California, and that court has held under a statute similar to subdivision 1 of § 6141, above quoted, that the surviving husband or wife of a deceased intestate, although incompetent to serve as administrator or administratrix of her or his estate, has power to request, and thereby have appointed, some competent person to act as administrator. *In re Stevenson*, 72 Cal. 164, 13 Pac. 404; *In re Bedell*, 97 Cal. 341, 32 Pac. 323; *Estate of Cotter*, 54 Cal. 215.

In the *Stevenson case*, *supra*, the court said:

"It clearly appears that this section contains no restriction whatever on the power of the surviving husband or wife first to administer on the estate of the deceased con-

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sort, or, failing in that, to request, and thereby have appointed some competent person as administrator. Section 1369, Code of Civil Procedure [Bal. Code, 6195], renders a nonresident surviving wife *incompetent to serve* as the administratrix of her husband's estate, but does not take away the right given her by section 1365, Code of Civil Procedure [Bal. Code, 6141], to have letters issued to some competent person whom she shall have requested to act as administrator."

As our probate law seems to have been largely borrowed from that of California, and as the provision in question has been construed by the highest court of that state, we feel constrained to adopt the construction there placed upon it. And if we were at liberty to rest the decision of this cause upon this provision, apart from and without reference to any other provision of the statute, we would be inclined to hold that the order appealed from should be reversed. But as we have seen, subdivision 3 of the section of the statute, which provides that letters of administration shall be granted to the surviving husband or wife of a person dying intestate, or to such person as he or she may request to have appointed, further provides that, if the persons so entitled shall neglect to *present* a petition for such letters for more than forty days after the death of the intestate, the court may appoint any suitable and competent person to administer the estate of such intestate. In this case it will be observed that the petition of Mr. McLean for letters of administration was not *presented* to the superior court until long after the expiration of the time designated by the statute, and, at the time he presented it, the petition of the respondent had already been filed. The failure of appellant to petition for letters of administration within the specified time did not, of course, *disqualify* him to act as administrator, but

it was a waiver of his right to be appointed, and conferred upon the court the discretionary power to appoint the respondent, or any other "suitable and competent person." 11 Am. & Eng. Enc. Law (2d ed.), p. 768, and cases cited; *Ramp v. McDaniel*, 12 Ore. 108, 6 Pac. 456. In the case last cited the court observed:

"The party entitled to precedence could certainly waive the right, and would do so under the statutes of this state, unless the application was made within the time specified."

It appears, therefore, that the order of the superior court granting letters of administration to the respondent was clearly in accordance with law, unless, as appellant contends, the court was without jurisdiction in the premises. That the several superior courts in this state have original jurisdiction of all matters of probate cannot be doubted, for such jurisdiction is conferred upon them by the state constitution. See Const., art. 4, § 6. The court undoubtedly had jurisdiction of both parties to this controversy, for both of them were before it in person and by their respective attorneys, and each of them was asking for an order favorable to himself. And hence the question is whether the facts stated in respondent's petition were sufficient to give the court jurisdiction of this particular case, or, in other words, of the subject-matter involved herein.

It is earnestly insisted by the appellant that the petition of the respondent was insufficient to confer jurisdiction of this case upon the court, for the reason that the respondent failed, at the time he filed his petition in court, to make the affidavit required by § 6142, Bal. Code, supra. Whatever may be the office, function, or design of the affidavit prescribed in said § 6142, it is certain that it was not the intention of the legislature that it must state facts essential to giving the court jurisdiction of the case, for

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the very same section of the statute unmistakably provides that the jurisdictional facts shall be set forth in the petition. The superior court acquires jurisdiction of a probate matter when a petition is presented to it by a proper person (which fact must be shown by the petition) stating, that the deceased died intestate, leaving property in this state; that he died in the county where the court is held, and at the time of his death was a resident thereof, or had his place of abode therein; or that he died in the county in which the court is held, leaving estate therein, and not being a resident of the state; or that he died out of the state, leaving property in the county where the petition is presented, and that he was not a resident of the state at the time of his death, and naming the heirs of the deceased. See Bal. Code, §§ 6087, 6141. The petition of the respondent states, that Emma Roller died *intestate* in Skagit county on the day above mentioned, leaving an estate therein (which is specifically described, and its value stated), and that at the time of her death she was a resident of said county; that the said decedent left surviving her E. W. Roller, her husband, and three children; viz., the petitioner Floyd H. Roller, aged twenty-one years, Winnie Campbell, nee Roller, aged nineteen years, and Lulu Roller, aged sixteen years; that there are no other heirs at law of said deceased; that petitioner is a proper person to be appointed administrator of said estate, under the laws of the state of Washington, said petitioner being a resident of Skagit county and over twenty-one years of age; and that no other application has been made for letters of administration upon said estate. The petition was subscribed and sworn to by the petitioner, and it certainly gave the court jurisdiction of the case. And having obtained jurisdiction, the court had the power, under the statute, to appoint any competent and suitable person.

In re Wilbur's Estate, 8 Wash. 35, 35 Pac. 407, 40 Am. St. 886. See, also, *In re Sullivan's Estate*, 25 Wash. 430, 439, 65 Pac. 793.

Under the circumstances, the court would have been entirely justified by the statute had it appointed appellant, as it found that he, as well as the respondent, was a suitable and competent person to administer the estate.

We find no error in the record, and the order of the superior court is therefore affirmed.

FULLERTON, C. J., and DUNBAR and MOUNT, JJ., concur.

[No. 4542. Decided October 13, 1903.]

LYDIA H. REIDHEAD *et al.*, Respondents, v. SKAGIT COUNTY, Appellant.¹

NEGLIGENCE—BRIDGES—LACK OF GUARDRAILS—DEATH BY WRONGFUL ACT—PROOF OF CAUSE OF DEATH—FAILURE OF PROOF—VERDICT NOT SUSTAINED WHEN BASED ON CONJECTURE. In an action for the death of a person alleged to have fallen from a bridge negligently maintained without any guardrails, there is a total failure of proof as to the cause of the death, and a verdict for plaintiffs is not warranted where it appears that the deceased left his team standing in the road the evening before to return some distance for a whiffetree, that the team wandered from the road down the stream without crossing the bridge, that deceased's body was found partly underneath the bridge up the stream, and the whiffetree four feet further up the stream, that deceased was familiar with the bridge, and that a person could approach the stream above the bridge and walk in the ravine beneath the same; since it is equally plausible and consistent with the testimony that he met his death other than by falling from the bridge, and the same cannot be left to conjecture or speculation.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered upon a verdict of a jury

¹Reported in 73 Pac. 1118.

88	174
83	230
33	174
89	333
33	174
41	207

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rendered June 16, 1902, in favor of plaintiffs, for \$1,000 for damages for the death of Andrew P. Reidhead, attributed to the lack of guardrails on a county bridge. Reversed.

M. P. Hurd, for appellant.

Gable & Seabury and *Million & Houser*, for respondents.

PER CURIAM.—This action was begun in the superior court of Skagit county by Lydia H. Reidhead and Vina C. Reidhead, a minor, by her guardian, against Skagit county, for the purpose of recovering damages for the death of Andrew Pearl Reidhead, alleged to have been caused by the negligence of the county. The negligence, as set out in the complaint, was that the county had constructed and maintained a bridge on a public highway without providing guardrails or other proper protection along the sides of the structure, whereby the deceased fell from the said bridge to the bottom of the ravine below, the same causing his death. The answer denied the material allegations of the complaint and set up an affirmative defense of contributory negligence. The allegations of contributory negligence were in turn denied in the reply.

The following statement substantially embraces the material facts as shown by the evidence. The bridge in question, at the time of the alleged accident, was a wooden structure about thirty feet in length by fifteen feet in width. The floor was twelve feet wide and consisted of cedar puncheons, held in place by logs or sticks of timber about nine or ten inches in diameter laid on each side of the structure, fastened with pins or spikes. The distance between banks at the top of bridge was about seventeen feet. Underneath, about eight or nine feet below, near

the center, there flowed a small stream about five and one-half feet in width, emptying into the Skagit river a few rods below. The water was cold and ran quite rapidly, causing a rippling sound that might, under ordinary conditions, be heard for three or four rods. Just above, on the upper side, north of the bridge, two small streams came together, forming one creek. Between the two streams at that place there was a small wedge shaped sand bar, coming to a point about two or three feet from the bridge. It sloped northwards twenty or twenty-five feet. This bridge was a substantial structure suitable for ordinary travel for teams and pedestrians. It had been maintained for a number of years, and was then a part of the county road leading from Hamilton to Baker river. It had no guardrails on either side.

The evidence showed, that deceased was sixty years of age; that he left his home at Hamilton about four o'clock in the afternoon of August 19, 1901, taking along with him his team, harness, and some logging apparatus, with the intention of going to work for a mill company on Baker river; that, in order to reach his destination, it was necessary for him to travel along this road; that about dusk on the same evening deceased, with his team and logging outfit, arrived at the place of John R. Kearney, located on the county road on the north side of Skagit river; that the bridge in question was about 300 yards distant from Kearney's, between his place and Baker river, which was about $2\frac{1}{4}$ miles beyond on said road; that deceased remained at Kearney's, fed his team, obtained something to eat for himself, departed with his horses and outfit about nine or ten o'clock on that evening, going in the direction of the bridge. In about twenty-five minutes he returned without his team, in search of a whiffletree which he had left

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behind, and which he found with the assistance of Mr. Kearney, who went with him for a short distance along the main road towards the bridge; that, before separating, Kearney asked deceased where he had left his team, and was told that they were left standing in the road. Kearney was the last person who saw Reidhead alive.

Early on the following morning one of the horses returned to Kearney's premises, dripping wet, whereupon Kearney, with assistance, went in search of the place where the horses reached the river. This place he found, a short distance below near a drift, where he also found the other horse. Mr. Kearney testified, that the horses did not go over the bridge; that they went from the road into the Skagit river; that the deceased had worked for him for about a couple of weeks, and was familiar with the bridge; that a diligent search was made by witness, with other parties, which was for the most part directed towards the river; that twelve or fifteen feet above the bridge there is a beach, where the creek may be approached with teams; that a person at that time could walk up the ravine under the bridge; that about the 25th of August following, witness was informed that some trappers had found a body near the bridge. The facts concerning the finding of the body are narrated by the witness Kearney in his direct examination as follows:

"Q. Where did you see the body; where was it lying?

A. Above the bridge with his feet toward the northeast. The singletree he had with him, that he came back for, was lying three or four feet still further up the stream in the direction of his feet. He was lying with the upper part of his person under the bridge. Q. With his head and shoulders under the bridge? A. Yes, sir. Q. How high is that bridge? A. Between nine and ten feet. Q. Were there any indications that the body had been a corpse for several days? A. Yes, sir. But I think it was the best

preserved body for the length of time it laid that I ever saw. The water was cold as ice, and it ran swift and washed the wounds off. Q. Were there any bruises on him? A. On the left side of the cheek he had a deep gash cut, and another here (indicating) not so deep. They were three or four inches apart."

There was some testimony tending to show that the wounds resembled scratches. A. W. Swain, justice of the peace, who held the inquest, testified in reference to the position of the body when he first saw it, in the following language:

"He was lying on the upper side of the bridge, on the north side of the bridge. The bridge runs east and west—just above the stream at least, on his back with his head down stream and his feet up stream. There was a bar formed just above the bridge, and part of his body was lying up on that bar, and his head lying in the water, and the water was running over his head to his ears. I don't know whether it had been any higher or not."

There was some testimony showing that near that spot there were some tin cans and small rocks, or gravel, but the bar was composed mostly of sand. After the evidence on behalf of respondents was submitted, appellant moved the trial court to direct a nonsuit in its favor, for the reason, among others, that it was not shown that Reid-head's death was caused by any negligence on the part of the county. The motion was denied, and exception taken. After hearing the evidence and instructions of the court, the jury returned a verdict for \$1,000 damages in favor of respondents. A motion for a new trial was made by appellant, which was overruled by the trial court, and judgment was rendered on the verdict. Defendant appeals, and alleges several grounds of error; the principal contention being insufficiency of the evidence to justify the verdict, and that the verdict is against law.

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The vital question in this case is whether there was any evidence adduced at the trial to sustain the verdict. In our opinion, the respondents failed to furnish or produce any evidence tending to show that the deceased fell from the bridge in question, or even that he was at or on the structure after he left Kearney's place on the evening of the 19th of August, 1901. Ordinarily it would seem strange that a man in possession of his faculties, familiar with the situation, should deliberately walk upon a structure such as is described in the testimony, and then fall or tumble off to the bottom of the gulch below. We think the case at bar falls squarely within the rule laid down by the decision of this court in *Armstrong v. Town of Cosmopolis*, 32 Wash. 110, 72 Pac. 1038, which was in many respects similar to the case at bar, in which the following language is used:

"But while it is true that the weight of the testimony is entirely for the jury, yet mere speculation and conjecture must not be confused with legitimate testimony. There are many theories which might be advanced, which would be mere guessing, that would be as reasonable as the theory contended for by appellants."

So in the present controversy, the deceased might have met his death in any one of several different ways, wherein the conclusion is equally as plausible and consistent with the testimony as are the contentions of respondents. The deceased might have gone down the embankment into the ravine, stumbled, and fallen into the creek in the darkness of the night, in the search for his horses. He might have met his death by violence, and the perpetrator might have placed the body there with the whiffletree, to make it appear that he had fallen from the bridge. We might go on theorizing as to the cause of his death, and arrive at the point from which we started. This unfortunate af-

fair is enveloped in mystery. We cannot ascertain the cause of the death, or see how any jury could consistently ascertain it from the testimony produced in the superior court. A jury's verdict must be founded on evidence. It is within their province to decide as to the weight, or preponderance of testimony, under proper instructions of the court. But when there is a total failure of proof as to a material and controverted allegation, a jury has no right to speculate thereon.

The case of *Armstrong v. Town of Cosmopolis*, *supra*, is amply sustained by the decisions of other courts. In *Hyer v. Janesville*, 101 Wis. 371, 77 N. W. 729, which was an action to recover compensation for personal injuries, the court, in its opinion at pages 376-7, uses the following forcible language:

"It has been said by this and other courts repeatedly, and is the established law, that a jury cannot properly be allowed to determine disputed questions of fact from mere conjecture. There must be some direct evidence of the fact, or evidence tending to establish circumstances from which a jury would be warranted in saying that the inferences therefrom clearly preponderate in favor of the existence of the fact, else the question should not go to the jury for determination at all. To allow a jury to reach a conclusion in favor of the party on whom the burden of proof rests, by merely theorizing and conjecturing, will not do. There must at least be sufficient evidence to remove the question from the realms of mere conjecture, else the trial court should pronounce the judgment of the law on the situation by taking the case from the jury when requested so to do."

Patton v. Texas & Pacific R. Co., 179 U. S. 658, 21 Sup. Ct. 275; *Philadelphia & Reading R. Co. v. Schertle*, 97 Pa. St. 450.

Misfortunes often happen through causes which cannot be ascertained. Human laws and institutions cannot cor-

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rect every wrong, or afford compensation for every loss or affliction. To uphold a verdict of the jury in a civil cause when there is no evidence to justify it, is not administration of justice, but the deliberate taking of the money or property of one party and transferring it to another.

Tested by the rules of law above stated, we reach the conclusion that the trial court erred in not granting appellant's motion for a nonsuit. The judgment of the superior court is therefore reversed, with directions to dismiss the action.

[No. 4677. Decided October 12, 1903.]

E. D. HOPKINS *et al.*, *Respondents*, v. INTERNATIONAL
LUMBER COMPANY, *Appellant*.¹

APPEAL—REVIEW—EVIDENCE—HARMLESS ERROR. Error in the admission of evidence in a law action tried by the court without a jury is harmless, as the supreme court tries the case *de novo* on appeal, and will disregard such testimony.

ACTIONS—DEMAND BEFORE SUIT—SALES. In an action for a balance due for lumber sold and delivered, a demand before suit only affects costs, and where it would have availed nothing, commencing suit is a sufficient demand.

CONTRACTS—SALES—FURNISHING ESTIMATES—ESTOPPEL. Upon a contract for the sale of lumber stipulating that the plaintiffs should furnish the same upon the estimates of the defendant's engineer, the defendant is estopped to assert that no estimates were obtained from the engineer, where the defendant constantly furnished the estimates, received the lumber and made payments thereon, and where the engineer was exclusively under defendant's control and refused to furnish estimates to the plaintiff, stating that he furnished them to the defendant.

SAME—EVIDENCE—ADMISSIONS. In such case the defendant can not complain of a judgment for the contract price for the amount admitted to have been furnished under the contract, and estimated.

¹Reported in 73 Pac. 1113.

Appeal from a judgment of the superior court for Spokane county, Prather, J., entered December 26, 1902, upon findings in favor of plaintiff after a trial on the merits by the court, a jury being waived, in an action upon contract for a balance due for lumber sold and delivered. *Affirmed.*

A. G. Avery, for appellant.

Danson & Huneke, for respondents.

PER CURIAM.—On the 28th of January, 1899, the plaintiffs and the defendant entered into a written contract, of which the following is a copy:

"This triplicate agreement, made and entered into this 28th day of January, A. D. 1899, by and between the International Lumber Company, a corporation, doing business under the laws of the State of Idaho, party of the first part, and Hopkins & Reed, of Spokane county, Washington, parties of the second part:

"Witnesseth: That whereas, the party of the first part is now engaged in performing a contract to furnish timber for bridge building for the Kootenai Valley, Bedlington and Northern Railway Company, in the performance of which work said party of the first part requires certain timber and lumber hereinafter mentioned, and has agreed to purchase the same from the parties of the second part, and the said parties of the second part have agreed to furnish the same.

"Now, therefore, in consideration of the mutual agreements and covenants hereinafter contained, the parties of the second part agree to furnish to the party of the first part all the native sawed timber for trestle bridges and foundations required by said party of the first part, with the exception of such coast timber and hewed timber as may be required by the party of the first part for the building of truss or trestle bridges, said sawed timber to be furnished by the parties of the second part at such times and in such quantities, sizes and dimensions as required by said party of the first part.

"The parties of the second part agree to begin operations

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and to furnish said timber at the rate of twenty thousand feet (20,000) per day within ten days from the date thereof, and to deliver the timber required for the bridge crossing the Kootenai River at the bridge site for said bridge and deliver the balance of the timber to be furnished under this contract either on cars f. o. b. with reasonable facilities for loading on the line of said Kootenai Valley, Bedlington and Northern Railway Company, or at the bank of said Kootenai River at a point to be designated by said party of the first part within one-fourth mile from the present mill site of said party of the first part, said party of the first part to have the right to designate whether said delivery shall be made on cars or at river bank as aforesaid.

"The party of the first part agrees to pay parties of the second part for said timber the following prices, to wit: Seven dollars per thousand feet board measure, for timber from twelve to twenty-four feet; seven and 50-100 dollars per thousand feet, board measure, for timber twenty-six to thirty-two feet long; and seven and 50-100 dollars for bridge ties, surfaced or sized on one side. All of said timber to be properly sawed on four sides, of uniform thickness and free from wane, good, sound, live timber, and in all respects conformable with the requirements of the engineer in charge of said work for said Kootenai Valley, Bedlington and Northern Railway Company. The measurements of said timber to be determined by and the payments therefor to be made on the basis of the estimates made by the chief engineer in charge of said work for said Kootenai Valley, Bedlington and Northern Railway Company or his assistants. The party of the first part agrees to pay for said timbers and the parties of the second part agree to accept payment therefor, upon the following terms, to wit: The said timber to be estimated and accepted in the usual manner by the said chief engineer or his assistants on the last day of each month (said estimates being the estimates of the timber furnished for said party of the first part, by said parties of the second part, as the basis of their payment therefor.)

"That upon the said estimate and acceptance by said engineer, the party of the first part agrees to pay parties of the second part on the 20th day of the month following said estimate, the amount due at the price hereinbefore named, less ten per cent thereof, which amount party of the first part is to retain until sixty days after the completion of this contract, and which said sum retained, the party of the first part agrees to pay to the parties of the second part within sixty days after the completion thereof.

"It is understood that if the parties of the second part fail to fulfill the terms hereof, that then and in that event the party of the first part, upon giving five days' written notice to parties of the second part, the party of the first part shall have the right to go into the open market and purchase such timber as shall be required by it to carry on its work under said contract at a price not to exceed fifteen per cent in advance of the prices herein provided for, and that such sum as it shall expend in such purchase shall be charged to the parties of the second part and deducted from the amount due or to become due under this contract from said party of the first part.

"It is further agreed that in case the party of the first part shall require more timber for the carrying on of its contract than the parties of the second part shall be able to furnish under the terms hereof that the party of the first part may purchase without in any way affecting the terms of this contract.

"It is further understood and agreed by and between the parties hereto, that this agreement shall cease to be binding upon the parties of the first part when said party of the first part shall have completed its contract with Porter Brothers for work on the line of said Kootenai Valley, Bedlington and Northern Railway Company.

"It is further agreed that as part consideration for this contract, the party of the first part hereby demises and leases to parties of the second part its entire saw mill plant, planer, blacksmith shop, boarding house and cooking utensils from this date until the 1st day of January, 1900; and in case this contract shall not be completed prior to

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the first day of December, 1899, then this lease is hereby extended until the expiration of thirty days after the completion of said contract.

"It is hereby agreed by and between the parties hereto, that said parties of the second part shall have the right during the term of this lease to saw logs into other timber than for railroad timber as provided in this contract, and that for such logs sawed other than herein provided for in this contract, said parties of the second part shall pay to the said party of the first part for the use of said property, the sum of one dollar (\$1.00) per thousand, board measure, and for all such lumber so sawed which shall be planed, the sum of fifty cents per thousand, board measure, it being understood and agreed that parties of the second part shall pay nothing for the use of said property in sawing said railroad timber; nor for sawing and planing the side timber taken from the railroad timber, it being agreed and understood that all logs from which railroad timber shall be sawed shall be used as far as possible in making railroad timber, it being further agreed and understood that the party of the first part reserves for its own use, the north room in the front end of the said boarding house.

"And it is further agreed by and between the parties hereto, that at the expiration of said lease, the parties of the second part will surrender possession of said saw mill and other property in as good condition as when received, except natural wear and tear, and damage by fire, the elements and unavoidable casualties, and that during the life of said lease, said parties of the second part agree to use reasonable care in the management and operation of said property.

"It is further agreed by and between the parties hereto, that any necessary machinery which said parties of the second part may put into said saw mill plant during the life of this lease, that at the expiration thereof, the said party of the first part shall purchase the same at its reasonable value, said value to be determined by two parties, one to be selected by the party of the first part, and one

to be selected by the parties of the second part, and in case said two parties cannot agree, said two parties to select a third party, and said three parties shall then determine the value of said machinery.

"It is further agreed that the party of the first part shall have the right at any time to inspect and examine said mill property. It is further agreed by and between the parties hereto that said parties of the second part shall purchase logs to be sawed as hereinbefore provided for as soon as practicable, same to be paid for on the 20th day of the month following said purchase, the total purchase for the first two months not to exceed two million feet, and said first party hereby agrees to advance to said second parties on the 20th day of March, and the 20th day of April, 1899, a sufficient amount to pay for said logs not to exceed three and 50-100 dollars per thousand scale measure.

"And it is further agreed that out of the first estimates received as hereinbefore provided for said second parties shall receive from said first party a sufficient amount to pay the running expenses of sawing all bridge timber, not to exceed two dollars per thousand, board measure, less all sums which said second parties shall have received for side timber or other timber sold.

"It is hereby agreed by and between the parties hereto that from the estimate payable on May 20th, 1899, said party of the first part shall retain all money which it shall have advanced to the parties of the second part herein under the terms of this agreement.

"In witness whereof, the parties have hereunto subscribed their names and affixed their seals the day and year first above written.

"International Lumber Company, Ltd.

"By W. L. O'Connell, (Seal)

"Secretary and Manager."

"E. D. Hopkins, (Seal)

"F. A. Reed, (Seal)"

Immediately after the execution of said contract, the plaintiffs entered upon the execution thereof and continued

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to manufacture and deliver lumber in pursuance of the same until on or about the 3d day of January, 1900, when the work was completed. Various sums had been paid by the defendant to the plaintiffs, and this action was brought on February 21, 1900, to recover an alleged balance of \$3,142.26. The complaint alleges that, in addition to the lumber and timber furnished in pursuance of said contract, in the summer of 1899, under and in pursuance of an oral agreement, the plaintiffs furnished to the defendant certain other lumber, which was not contemplated by the written contract, and that that part of said written contract requiring plaintiffs to furnish timber for road construction north of the international boundary line between the United States and British Columbia, was, by mutual consent, waived. The answer of the defendant denies the waiver of any portion of said written contract, denies the making of any oral contract, and claims that all of the lumber furnished was intended to be, and was, furnished under and in pursuance of the written contract, alleges payment, and contains a counterclaim for damages for failure to comply with the conditions of the written contract. The cause went to trial before the court, a jury being waived, and after a long and tedious trial the court made its findings of fact and conclusions of law in favor of the plaintiffs, and rendered judgment against defendant for \$2,597.69 with interest and costs. Defendant appeals.

The principal question for determination by this court are questions of fact. The appellant excepted to the findings of fact and conclusions of law, and assigns as error the ruling of the court in that respect. The main contentions of the appellant are with reference to the alleged waivers of portions of the provisions of the contract, and

that no estimates had been obtained from the engineer, which latter was a condition precedent to any amounts coming due under the contract. Appellant devotes considerable space in its brief to the question of erroneously admitted evidence; but, even if error in that respect were committed, it would not warrant a reversal of the judgment. This court must try the case *de novo*, and, if it finds that any evidence has been improperly admitted, it will simply disregard such evidence.

It is claimed by the appellant that this action was prematurely brought, that there had never been a demand upon it for the amount of the claims, and that it had never had an opportunity to settle. The testimony is somewhat conflicting on this point. However, the commencement of an action is, in our opinion, a sufficient demand. The only necessity of the demand is to enable the debtor to settle without being subjected to unnecessary costs. It is apparent in this case that it would not have availed the respondents anything if a demand had been made before the commencement of the action.

The court found that estimates had been furnished for all of that timber delivered in pursuance of the written contract, and a considerable portion of appellant's brief is devoted to a discussion of this question, appellant insisting that estimates had not been obtained. It seems from the testimony that applications had been made by respondents to the engineer for estimates, and he refused to furnish them, saying that respondents would have to look to appellants for the estimates, as he furnished the estimates to it. We have failed to find anywhere in the record that any estimates were furnished by the engineer direct to the respondents. On the contrary, appellant constantly furnished estimates to the respondents and made payments

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upon those estimates, and it seems to us that, even if these estimates—which were furnished by the appellant and upon which payments were from time to time made—were in reality not the estimates of the engineer, the appellant ought not to be permitted to take advantage of that fact at this time and avoid a recovery; nor should it do so for the further reason that it was exclusively within the power of the appellant to procure the engineer's estimates. It is not denied by the appellant that it received all the timber for which payment is demanded; but it is insisted that appellant is not liable for the amount thereof under the terms of the contract, unless the engineer furnished estimates for the same. It seems to us that the evidence clearly shows that both parties adopted the estimates as the engineers' estimates—at least, that the appellant led the respondents to believe that it was furnishing engineer's estimates—and, as it alone had the power to do so, it is estopped to deny that it did so furnish them.

Exhibit 1, which, under the circumstances of the case, we think was properly admitted, is what might be termed a summary of the whole lumber transaction, and is a final estimate, the first line of which reads, "Timber as per engineer's estimate 1,533,411 ft." Under the contract appellant had power to, and did, purchase timber from other parties. It was included in this estimate, and the appellant itself segregated the items, and gave Hopkins & Reed credit for 943,416 feet thereof. The court rendered judgment for 964,398, or about 21,000 feet more than the appellant shows was the engineer's estimate. This 21,000 feet was made up of timber that went into false work, not included in the written contract, and some that was permitted by the appellant to float away and be lost, neither of which was included in the estimate. There were four

causes of action in the complaint, only the first of which called for lumber under the contract, appellant insisting that all of the timber, etc., was intended to have been furnished under the contract. But, be that as it may, the final estimate (Exhibit 1) admits that all of the timber furnished, except the 21,000 feet, was furnished under the contract, and was estimated, and, as appellant is not required to pay any greater sum for that which the respondents claim was not furnished under the written contract, it certainly has no cause to complain in so far as the 943,416 feet is concerned.

There are various other questions involving minor amounts, but we are satisfied that there is sufficient testimony to support the findings of fact, and that the findings support the conclusions of law. The judgment should be affirmed.

[No. 4420. Decided October 13, 1903.]

SAMUEL G. CORBETT, *Respondent*, v. THE CIVIL SERVICE
COMMISSION OF THE CITY OF SEATTLE *et al.*,
Appellants.¹

APPEAL—BOND—EXEMPTION IN BEHALF OF CITY. Where the civil service commissioners are city officers, and prosecute an appeal from the reversal of their official decision, no bond on appeal is necessary, as the appeal is on the city's behalf.

BILL OF EXCEPTIONS—SUFFICIENCY ON WRIT OF REVIEW. Where a contest before a city civil service commission is brought up to the superior court upon a writ of review and heard upon the return and the testimony introduced before the commission, as a bill of exceptions, the same, upon being certified to contain all the material facts, etc., is a sufficient bill of exceptions or statement of facts on appeal to the supreme court.

¹Reported in 73 Pac. 1116.

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APPEAL—DISMISSAL—BRIEFS—PRINTING FINDINGS—EXCEPTIONS TO FINDINGS. The failure of the appellants to print the findings of fact in which they allege error, or to take exceptions thereto in the court below, is not ground for striking the briefs or dismissing the appeal, but the court will treat the findings as conclusive, and not review the evidence.

WRIT OF REVIEW—ATTESTATION. A writ of review issued by order of court upon the showing required by statute, and sealed and attested by the clerk, is sufficient without attestation by the judge.

SAME—APPLICATION—SPECIFICATION OF ERRORS—DEMURREE. A demurrer to an application for a writ of review on the ground that the errors are not specifically pointed out is properly overruled when it is sufficient to apprise the party of the errors, and a motion to make more definite was not made.

Appeal by the civil service commission of Seattle from a judgment of the superior court for King county, Tallman, J., entered April 17, 1902, upon findings of fact and conclusions of law made by the court after a hearing upon a writ of review, reversing the decision of said commission and reinstating the respondent, Samuel G. Corbett, as a member of the police force of said city. Affirmed.

Mitchell Gilliam and *William Parmelee*, for appellants.

John F. Miller, for respondent.

ANDERS, J.—On and prior to February 14, 1902, the respondent, Samuel G. Corbett, was a member of the police department of the city of Seattle, and on that date was, under the classified civil service, a first-grade detective in said department. On the date aforesaid the chief of police of the city made an order removing the respondent from the department, and, in accordance with the provisions of the charter, filed with the civil service commission of the city his order of removal, and a statement of the cause of the removal, which was "for attempting to search the

house of J. H. Brownlee, at 319 Boren avenue, on the evening of February 12th, 1902, without a search warrant." From this order of removal the respondent, acting under the provisions of the city charter, duly appealed to the civil service commission. That commission is created by the city charter, and is charged with the duty, among others, of hearing and judicially determining any appeal which may be taken by any member of the police department of the city from an order of removal or suspension made by the chief of police.

On February 20, 1902, a hearing was had on the respondent's appeal before the commission, at which the respondent appeared in person and by his attorney. At said hearing evidence was introduced both for and against the respondent, and on the 24th day of February, 1902, the commission filed its written decision and order suspending the respondent, Corbett, from the police department of the city of Seattle for a period of ninety days from February 12, 1902, without pay, and declaring that after the expiration of said suspension he be reduced from his former rank to that of third grade patrolman.

The respondent, feeling aggrieved by this order and decision of the civil service commission, removed the cause to the superior court of King county by writ of review. At the time set for the hearing in the superior court, the appellants appeared specially and moved to quash the writ of review, on the grounds (1) that the court had no jurisdiction to issue the writ; (2) that the writ was not attested in the name of the judges, or any one of the judges, of said court; and (3) that said court had no jurisdiction to review, correct, modify, or set aside any of the proceedings of the civil service commission. This motion was denied, and an exception to the ruling of the court duly taken.

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Appellants thereupon filed a demurrer to the affidavit for the writ, upon the ground that the same did not state facts sufficient to authorize the court to issue a writ of review. The appellants then filed the record of the proceedings of the civil service commission touching the respondent's appeal from the order of the chief of police, as and for their return to the writ of review; and the respondent caused to be filed with the clerk of the court a transcript of the testimony taken before the civil service commission. No testimony was introduced at the hearing before the superior court, other than that contained in this transcript, which is designated in this record as a "bill of exceptions."

The court, after hearing all parties, made and filed its findings of fact and conclusions of law, and thereafter rendered its judgment and decree setting aside and annulling the said order of the chief of police and the finding and decision of the commission, in so far as the same related to the suspension and reduction in rank of the respondent, and ordered that the respondent's reinstatement date from February 24, 1902, the date of the order made by the commission, and that he be reinstated to the grade and rank held by him at the time of the order of removal made by the chief of police.

The respondent moves to strike appellant's brief herein, and to dismiss this appeal, on the grounds and for the reasons, (1) that no appeal bond has been filed herein within the time limited by law, or at all; (2) that no statement of facts or bill of exceptions, or proposed statement of facts or bill of exceptions, has been filed, served, or settled herein within the time allowed by law, or at all; (3) that appellants, alleging error in certain findings of fact herein, have not printed in their brief the findings of fact, with the exceptions thereto, on which question is

sought to be raised by them on this appeal, and have not printed such findings as they requested the lower court to make, which were refused, with their exception to such refusal; and (4) that this appeal was taken for delay.

This motion must be denied. The civil service commission is created by, and derives its authority from, the city charter. It is one of the departments of the city government, or, as found by the court below, it is "one of the inferior tribunals or boards of the city." Its members acted officially and judicially, and not individually, in considering the matter of respondent's appeal. They were officers of the city, and acted in its behalf, and they have appealed in their official capacity. If the city were the appellant, it would not be required to give an appeal bond. And we think the civil service commission represented the city to a sufficient extent at least to entitle it to the same immunity, under the doctrine announced in *Townsend Gas etc. Co. v. Hill*, 24 Wash. 469, 64 Pac. 778.

The cause was tried in the court below, as we have already intimated, upon the writ of review, the so-called return thereto, and the testimony introduced before the commission, which is denominated, and seems to have been treated by the court as, a bill of exceptions. And the learned judge before whom the cause was tried certifies that "the same contains all the facts, matters, and proceeding heretofore occurring in said cause and not already a part of the record, . . . counsel for plaintiff and counsel for defendant being present and concurring." In view of this certificate, and of the record before us, we are unable to assent to the proposition that no bill of exceptions or statement of facts has been settled herein.

While it is true that appellants have not printed in their brief the findings and conclusions made by the superior

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court, that they seem to allege error in the findings of fact, and that no exceptions were taken in the court below to the findings of fact, still this court would hardly be justified either in striking appellants' brief or dismissing the appeal on that account alone. Where the findings of fact are not objected to in the trial court, this court will simply accept them as conclusive as to the facts in the case, and will not consider the evidence on appeal. Bal. Code, § 6520; and see *National Bank of Com. v. Seattle Pickle & Vinegar Works*, 15 Wash. 126, 45 Pac. 731.

The appellants contend that the court below erred in denying their motion to quash the writ of review. The first ground of the motion, namely, that the court had no jurisdiction to issue the writ, was not insisted upon, and was in fact practically abandoned, by the learned counsel for the appellant on the argument in this court, and we will therefore not stop to consider it. But counsel nevertheless insists that his motion should have been granted because of the fact that the writ was not attested in the name of the judges, or any one of the judges, of the superior court; and it is urged that the writ was absolutely void without such attestation, and that the court erred in declaring it valid.

Our statutes provide that a writ of review shall be granted by any court, except a police or justice court, in certain specified cases, and that the application for the writ must be made on affidavit by the party beneficially interested; and respondent's application in this instance was so made, and the writ issued by order of the court was based thereon. No statute of this state has been referred to by counsel, or discovered by us, providing the manner or form in which writs of review, issued out of the superior court, shall be attested, but doubtless the writ itself

should show that it emanated from a proper tribunal. The writ in question was attested and sealed by the clerk of the court, and we think the court was warranted in holding it a valid attestation. See *Miller v. Trustees of Schools*, 88 Ill. 26.

The appellants further contend that the court erred in overruling the demurrer to respondent's application, on the ground that the specifications of error contained therein are insufficient for the reason that the exact errors alleged to have been committed by the civil service commission are not therein specifically pointed out. But we are satisfied from an examination of the affidavit that it was sufficiently specific to apprise the appellants of the errors which the respondent claimed were committed by the commission. If it was not, a motion to make it more definite and certain would, in all probability, have been granted by the court.

Inasmuch as the conclusions and judgment of the trial court are fully warranted by the established facts of the case, it follows that the judgment was not improperly rendered. We perceive no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., and MOUNT and DUNBAR, JJ., concur.

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[No. 4848. Decided October 27, 1903.]

FRANK A. JONES *et al.*, Appellants, v. JOSEPHINE C. HERRICK *et al.*, Respondents.¹

APPEAL—DISMISSAL—BOND—JUSTIFICATION OF SURETIES. An appeal will not be dismissed because the justification of the sureties states they are worth \$200 in property *not* subject to execution, where no exception to their sufficiency was taken below, as the use of the word "not" was evidently a clerical error.

STATEMENT OF FACTS—TIME FOR FILING. A statement of facts not served within thirty days from the rendition of the judgment, where no extension was obtained will be struck out, as § 5062, Bal. Code, is mandatory.

BRIEFS—RULES OF COURT. A brief will not be struck out for failure to page the exhibits, where no material injury resulted from the non-observance of rule 8.

Motions to dismiss an appeal from a judgment of the superior court for King county, Tallman, J., and to strike briefs. Denied.

Also, motion to strike statement of facts. Granted.

S. S. Langland, for appellants.

Mitchell Gilliam, for respondents.

DUNBAR, J.—Respondents interpose four motions in this case: (1) to dismiss the appeal, (2) to strike the statement of facts, (3) to strike the exhibits attached to the transcript, and (4) to strike the briefs and affirm the decree.

The motion to dismiss the appeal is based upon the defective affidavit of the sureties, of which the following is a copy:

"State of Washington, County of King.—ss.

"John P. Jacobson and William Thaanum, upon their oaths does depose and say, each for himself and not for the

¹Reported in 74 Pac. 332.

other, that he is worth the sum of two hundred (\$200) dollars in property in the State of Washington, not subject to execution and force sale over and above all liabilities and exemptions.

“(Signed) John P. Jacobson, Wm. Thaanum.
“Subscribed and sworn to,” etc.

The statute provides, and we have uniformly held, that exceptions to the sufficiency of the surety or sureties in an appeal bond should be taken in the court below, where an examination in detail is made of the sufficiency of the sureties in all respects. It is, however, claimed by the respondents that this bond is not governed by § 6510, Bal. Code, which requires the sureties, on motion of the respondent, to appear before the judge and justify as to their sufficiency, for the reason that it affirmatively appears from the justification that the sureties are not competent and legal sureties under the provisions of the law, because the affidavit states that each surety is worth the sum of \$200 *not* subject to execution and forced sale, over and above all liabilities and exemptions. But the word “not” in this bond is so evidently a clerical error that the court does not feel justified in construing it literally, the evident intention of the affiants being to state that they were worth \$200 subject to execution over and above all liabilities and exemptions. The motion to dismiss the appeal will therefore be denied.

The second motion—to strike the statement of facts—must, however, be sustained. It appears from the record that the proposed statement of facts was not served upon respondents within thirty days from the rendition of the judgment, and that no extension of time was obtained either by stipulation or order of the court. § 5062, Bal. Code, provides that a proposed bill of exceptions or statement of facts must be filed and served either before or

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within thirty days after the time begins to run within which an appeal may be taken from the final judgment of the cause. This provision of the statute has been held by this court to be mandatory, and in the case of *State v. Seaton*, 26 Wash. 305, 66 Pac. 397, it was said:

"The due administration of justice requires that the rules relating to the time in which an appeal shall be taken and perfected be definite and fixed. Any thing else is confusion. And it would seem that, had it been intended by the legislature that the rules fixing these times should be enforced or ignored as the courts might, in the exercise of their discretion, direct, it would have said so in terms, and not left it to be inferred from language couched in loose generalities and of doubtful interpretation."

To the same effect, *State v. Landes*, 26 Wash. 325, 67 Pac. 72; *Wollin v. Smith*, 27 Wash. 349, 67 Pac. 561. This disposes of the third motion—to strike the exhibits attached to the transcript.

The motion to strike the brief and affirm the decree for the reason that the exhibits are not paged will be denied. An examination of the brief and the record satisfies us that no material injury has been effected by the non-observance of rule 8.

The cause will be retained for the adjudication of any questions arising upon the pleadings.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4405. Decided October 27, 1903.]

ORLANDO DEMARIS, *Respondent*, v. OLIVER P. BARKER,
as *Executor, etc., et al., Appellants*.¹

COURTS—JUDGMENT—JURISDICTION—DECISION IN NINETY DAYS. The failure of a judge to decide a case within ninety days from its submission, as required by const., art. 4, § 20, does not render the judgment void for want of jurisdiction.

COURTS—VISITING JUDGES—POWERS OF. The visiting judge has the same powers as the regularly elected judge of the county.

DESCENT—DISTRIBUTION—DEEDS BY HEIRS—PENDING ADMINISTRATION—TITLE VESTS WHEN—DEMURRER. A title founded upon deeds of the heirs prior to the law of 1895, made pending administration of the estate, is sufficient, as against general demurrer, in view of Bal. Code, § 6361, recognizing conveyances by heirs prior to distribution, and Laws 1895, providing that the title to real estate shall vest in the heirs immediately upon the death of the ancestor, and expressly extending the rule to the transmission of all such previous titles, which were thereby confirmed.

EXECUTORS—SALES—ACTION TO ENJOIN SALE TO PAY DEBTS—COMPLAINT—SUFFICIENCY—ADMISSIONS. An admission that the land of an estate was sought to be sold for the purpose of paying the debts of the estate, does not render a complaint to enjoin the sale demurrable, when it alleges facts showing that the land in question was only secondarily liable, if at all, and that the sale thereof would be inequitable.

SAME—EFFECT OF ORDER OF SALE—FRAUD. A complaint to enjoin the sale of lands to pay the debts of the estate is not demurrable because it appears to be pursuant to an order of the probate court, where it alleges that the order was procured through conspiracy and fraud, and without notice to plaintiff until after the sale was advertised.

APPEAL—REVIEW—STATEMENT OF FACTS—CERTIFICATE. Where a statement of facts recites that after the taking of testimony before a referee, the case came to a trial, at which both sides "introduced certain evidence," which is not set forth in the statement, a certificate that the statement "together with the evidence therein referred to" contains all the material facts, does not show

¹Reported in 74 Pac. 362.

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that the record contains all the evidence, and is insufficient to warrant a review upon a trial *de novo*.

SAME—DEPOSITIONS—WRITTEN EVIDENCE—CERTIFICATE BY CLERK. Depositions, copies of records, and such testimony as is not returned with the referee's report, so as to form a part of the record, must be brought up by a statement of facts, settled by the judge, and can not come up over the certificate of the clerk.

Appeal from a judgment of the superior court for Walla Walla county, Chadwick, J., entered February 6, 1902, upon findings in favor of plaintiff after a trial on the merits before the court without a jury, perpetually restraining the sale of lands of an estate to pay debts. Affirmed.

C. B. & Wm. H. Upton and *Gillis & Reynolds*, for appellants, contended, *inter alia*, that at the time the deed was made the heirs had no title to convey. *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648; *Dunn v. Peterson*, 4 Wash. 170, 29 Pac. 998; *Hill v. Young*, 7 Wash. 33, 34 Pac. 144; *Tucker v. Brown*, 9 Wash. 357, 37 Pac. 456. And the right of the executor became a vested right which could not be defeated by a subsequent act of the legislature. *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337; *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264.

W. T. Dovell and *Lester S. Wilson*, for respondents.

PER CURIAM.—The respondent brought this action to enjoin the appellants from selling, or causing to be sold, as property of the estate of Sarena Barker, deceased, certain real property situated in Walla Walla county, and to quiet his title to the same. The respondent was successful in the court below, and this appeal is from the decree entered in his favor.

As a preliminary question, the appellants urge that the trial judge was without jurisdiction to render a judgment

in this cause at the time he rendered the judgment appealed from, for the reason that more than ninety days had elapsed since he had taken the cause under advisement, and no rehearing had been had or ordered in the meantime. This contention is founded upon § 20 of art. 4 of the state constitution, which reads as follows:

"Every case submitted to a judge of a superior court for his decision shall be decided by him within ninety days from the submission thereof: Provided, That if within said period of ninety days a rehearing shall have been ordered, then the period within which he is to decide shall commence at the time the cause is submitted upon such a rehearing."

As another section of the constitution declares all of its provisions to be mandatory unless by express words they are declared to be otherwise, it is argued that this provision, being mandatory, can have no force or effect if it is not held that delay beyond the period fixed deprives the court of jurisdiction to render a decision.

It seems to us, however, that such a construction of the section would be directly subversive of its purpose. Manifestly, the purpose of the provision was to secure a speedy determination of causes submitted to the court for decision. "The law's delays" is not a modern phrase. Judges of the old time were not wholly unlike some of their successors in office. They, too, were inclined to waver between two opinions, fearful to pronounce the one lest the other should be deemed the more powerful, and delays caused thereby have at all times been more or less prevalent, and have always been regarded as something of an unmixed evil when viewed from the standpoint of a litigant or the public.

It was to furnish a remedy for this that this clause of the constitution was adopted. It was thought that judges,

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who derived their authority from that instrument, would obey its behests, or, if they did not, that some means would be found to coerce obedience; or, indeed, it may have been thought that disobedience would be ground for an impeachment; but certainly it was never thought that the remedy was to be found in the holding that the judgment afterwards rendered is nugatory. To give it this construction is to prolong the very evil it was sought to avoid, and to punish the very persons whom it was intended should be its beneficiaries. If the judgment when rendered is to be declared void, then the litigants, who have already been subjected to an unconstitutional delay, must again be subjected to the additional delays necessary to again bring the cause to the condition it was before the court violated its sworn duty. They must also pay the accruing costs necessary for that purpose. Were the delay something within the control of the litigant, were it caused by his own dereliction, the conclusion contended for might be tolerated. But the litigant cannot control the action of the court after he has submitted his cause for its decision. From that time on it rests within the will of the judge, and the law provides no means by which a litigant can coerce him into action, until, at least, the limit of time has expired which is here thought to render action nugatory. To punish the litigant for the wrongs of the court which he has no power to prevent, is not, we repeat, the purpose of this constitutional provision, and to so hold would be subversive of its intent.

But this cause was decided by a judge called in from another county, and it is thought that this fact makes some difference in the rule. We think otherwise. The visiting judge, when regularly called, is just as much judge of the court where he is sitting as is the regularly elected

judge of that court, and his powers and responsibilities in the matters he is called in to hear are not less nor greater than are those of the regularly elected judge.

Passing to the assignments of error based upon the rulings of the trial court, it is first urged that the court erred in overruling the appellants' general demurrer to the amended complaint. Four reasons are urged in support of this assignment, the first of which is that it appears on the face of the amended complaint that the respondent has no title to nor interest in the property which he seeks to restrain the appellants from selling and to quiet in himself.

From the allegations of the complaint it appears, that the land in controversy was formerly a part of the estate of Sarena Barker, deceased; that the executor of that estate, after proof of the will of the deceased and the issuance of letters testamentary, and while the estate was in process of administration, joined with the heirs and devisees, who were all adults, in deeds one to the other by which they sought to partition the estate between them. The respondent claims title through one of these deeds, which was made on the 26th day of June, 1890; that is, a deed made prior to the time the statute vesting in heirs and devisees title to the estates of deceased persons immediately on the death of such persons went into effect.

The argument of the appellants is that under the rule of *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648, the heirs at that time had no title to the real property of the estate, and hence their deed could pass no title to the purchaser, and that the executor's deed passed no title, because he could only convey through an order of the probate court, obtained after a showing of necessity, and no such order was obtained. It may be conceded, we think, that the

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contention of the appellants with reference to the deed of the executor as executor is correct, inasmuch as it is not shown that the will authorized the settlement of the estate without the intervention of the probate court, and no order was obtained directing him to sell the property; for, without the will authorizes it, a deed of an executor of real property of an estate, where the same is not authorized by the court having probate jurisdiction, will pass no title to the purchaser.

The question, then, is, did the heirs have such an interest in the lands of the estate that their deed thereto, pending administration, passed title to the purchaser? In *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648, this court said that, as a general rule, "the intervention of the probate court and an adjudication and distribution thereunder are essential to the passing of the title of the ancestor to the heir so perfected as to make it beneficial to him." This was said in a case where the plaintiffs sought to recover the possession of real property, in an action in which their allegation of title was that their ancestor had died seized of the premises; the court holding that it did not follow from this allegation, in view of the probate statutes, that they were entitled to possession.

But it is evident that the court did not intend to announce the broad doctrine that an heir had no interest in the real estate of his ancestor which he could convey to another by his deed of the same, prior to a decree of distribution made by a probate court. Such a conclusion would have been contrary both to the statute which it was purporting to construe and to a previous decision of the court. The statute relating to partition and distribution of estates then in force provided specifically that, when the heirs of an estate had conveyed their interests in the same

prior to distribution, the portion to which they would otherwise have been entitled should be set aside to the purchasers. Bal. Code, § 6361. Surely, if it were the purpose of the legislature to withhold title from the heir pending the administration of the estate, it would not have provided for a recognition of a conveyance of that title by the heir.

So, in *Hanford v. Davies*, 1 Wash. 476, 25 Pac. 329, decided, as we say, prior to *Balch v. Smith*, it was assumed by the court that the heir took title immediately on the death of the ancestor, and the argument upon the questions involved proceeded upon that theory. Since *Balch v. Smith*, the rule that the heir takes title immediately has been several times recognized. In *Hill v. Young*, 7 Wash. 33, 34 Pac. 144, it was held that an heir whose ancestor died in 1883 could, in 1891, claim complete title to land inherited from the ancestor, although there had been no administration of the estate; the court saying that it so decided "in full view of *Balch v. Smith*." In *Tucker v. Brown*, 9 Wash. 357, 37 Pac. 456, it was held that a complaint by an heir, which alleged that no administration was pending, and that there was no necessity for one, showed such title in the heir as to enable him to maintain an action to recover lands inherited from his ancestor. In *Christofferson v. Pfennig*, 16 Wash. 491, 48 Pac. 264—an action to quiet title—the question was whether title derived under a will passed to the devisee prior to an administration of the estate. Speaking to this point, the court said:

"One of the questions to be determined is whether or not the title to one-half of the lands vested in the husband under this provision of the will. The lower court refused to find that such title vested in said Hans Roholt, and made no finding on that subject, and exception was duly taken.

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The respondent contends that no title vested in Hans Roholt under the decision in *Balch v. Smith*, 4 Wash. 497, 30 Pac. 648. While this case has never been formally overruled, and while it may have been cited in opinions subsequently rendered, in excepting cases therefrom, no case has arisen since where it has been given the effect contended for by the respondent here, and a different rule has since been established by the legislature (Laws 1895, p. 197), but that act does not affect this case. We are not disposed to follow the case of *Balch v. Smith* to the extent of giving it the effect contended for by the respondent, for we are of the opinion that the title to one-half of said lands vested in the husband, subject to the trust imposed by the will, even though it did not take effect for all purposes until the will was probated."

These cases are clearly contrary to the expression in *Balch v. Smith* above quoted, as they can be upheld on no other theory than that title passes from an ancestor to an heir without the intervention of the probate court. Being subsequent to that case, and contradictory of it, they ought to be allowed to control on this particular question. It must be remembered, also, that since the decision in the *Balch* case the statute has set the question at rest, in so far as it was within the power of the legislature to do so. The act of 1895, p. 197, declares that when a person dies seized of lands, tenements, or hereditaments his title there-to shall vest immediately in his heirs or devisees, subject to such charges as such land is liable to under existing laws; further declaring that "this act shall apply to and govern the transmission of title of . . . persons already deceased, whether letters testamentary or of administration have been granted on such estates or not, and the title of all heirs and devisees, and their grantees, to any such real property is hereby confirmed and made valid to the same extent as if this act had been passed before the death

of such decedent." Under any view of the law, therefore, it seems to us that the allegations of title contained in the complaint are sufficient to sustain it against a general demurrer.

The second and third objections raise substantially the same point. The objection is that it appears on the face of the complaint that the debts of the estate have not been paid, and that the very sale the respondent seeks to enjoin was to be made for the purpose of paying such debts. It is true the complaint does allege that there are debts of the estate unpaid, and that this land was ought to be sold for the purpose of paying those debts; but it goes much further than this. It sets out a state of facts from which it is made to appear that the lands in question are only secondarily, if at all, liable for those debts, and that it would be unjust and inequitable to permit the land to be sold for the purpose of satisfying them. If these allegations are true—and for the purposes of demurrer they must be taken as true—they overcome the statements of fact relied upon by the appellants, and show that, in spite of those facts, the land should not be sold. The court must look to the complaint as a whole to determine the question whether or not it states a cause of action. Admissions and statements which, standing alone, might seem to negative the right to the relief sought, may be explained by other allegations of the complaint, and so overcome them as to show that, in spite of them, the relief sought should be granted; and such is the case here.

The fourth ground is that it appears on the face of the complaint that the sale sought to be enjoined was being had pursuant to an order of the probate court directing it. And it is argued that the respondent had the right to present to the probate court, in opposition to the order of sale,

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all of the matters which he now alleges for the purpose of enjoining it, and, having failed so to do, is precluded by the order, which in effect is a judgment finding the sale proper and necessary.

But the respondent alleges that the order was obtained through conspiracy and fraud, and that he had no notice thereof until after the same had been made, and his property advertised for sale. While applications for relief in equity against judgments at law are at all times viewed with the closest scrutiny, and will not be granted except upon the clearest and strongest reasons, yet courts have not hesitated to grant such relief where the judgment sought to be set aside has been obtained through fraud, deceit, accident, surprise, or some adventitious circumstances beyond the control of the judgment debtor. 16 Am. & Eng. Enc. Law (2d ed.), 374, 375. The allegations of the complaint here clearly bring the pleader within the rule, even though it be conceded that the order of sale is a judgment in the sense contended for by the appellants—a contention with which the respondent does not agree, and which we have found it unnecessary to decide.

Moreover, the respondent has, by a supplemental complaint, shown that a large part of the debt for which the land was ordered sold has been paid subsequent to the order of sale, and has pleaded other facts tending to show that a sale for the balance would be now highly inequitable. While these facts might properly have been brought to the attention of the court in the probate proceeding, as a reason for recalling its order of sale, still, they are properly to be considered in connection with allegations of fact of purely equitable cognizance which could not be there heard, and may be considered in aid of such allegations. The complaint is not faulty, therefore, for any of the rea-

sons assigned, and the demurrer was properly overruled.

The next question urged is that the findings of fact are not supported by the evidence. The respondent contends that this question is not before us, because the appellants have not brought the evidence in the case here for review; and this contention, we think, must be sustained. The record, as brought here, consists of a transcript of the pleadings, the judgment, and the orders and journal entries made in the case, together with copies of certain evidence purported to have been taken before a referee, a copy of a deposition, and copies of certain probate records; all of which appear over the certificate of the clerk to the effect that the same are true and correct copies of so much of the record as he has been requested by the appellants' attorneys, and is by law required, to transmit to the supreme court. This is followed by what is denominated a statement of facts, which, omitting the title and certificate is as follows:

"This action (and another one against the same defendants wherein Emery E. Hoskins was plaintiff, practically identical in character, except that different lands were involved) was begun in the above entitled court in 1896. The complaints were filed October 10, 1896, in both actions; and, in the Hoskins case a temporary restraining order, restraining the executor, Barker, from selling lands claimed by plaintiff, issued on the same day. All the defendants entered their appearance in each action, November 6, 1896.

"Subsequently, on February 1, 1897, the plaintiffs, by leave of court, filed and served amended complaints in each case, which are shown in the respective records. Issue was joined in each case by all of the defendants, and it was then stipulated that the two cases should be tried together; that evidence should be taken before H. S. Jackson, as referee, and that said evidence, and any other that

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might be admitted, be treated and considered as given in both actions.

"On behalf of plaintiffs certain evidence was taken before said Jackson, as shown in the record, as well as the deposition of Harry Krutz; and, on August 28, 1901, both of said causes came on for trial before Hon. S. J. Chadwick, superior judge, presiding, at which time plaintiff, by leave of court, filed a supplemental complaint in each case, and, after the defendants had answered the same, introduced evidence in support of the allegations thereof. After plaintiffs had rested the defendants filed in each case a motion for a nonsuit, and, upon said motions being denied, introduced certain evidence in each case and rested. Thereupon, after argument by counsel, the court, on the day last mentioned, took both cases under advisement.

"On January 7, 1902, the court filed in each case findings of fact and conclusions of law which, on exceptions by defendants, were in certain respects modified by orders filed February 6, 1902, and final decrees were entered in both cases February 6, 1902."

The certificate of the trial judge is to the effect that the statement, "together with the evidence therein referred to," contains all of the material facts of the case. From this it will be observed that it is impossible for this court to know whether or not the evidence on which the case was tried in the court below is before us. We have here, over the certificate of the clerk, copies of certain testimony taken before a referee, a copy of a deposition, and copies of some probate entries, and, over the certificate of the judge, a recital that both parties to the action introduced evidence; but whether the copies certified to by the clerk form a part, or the whole, of the evidence referred to in such certificate, the record is silent. This is insufficient to warrant this court in trying the action *de novo*. Before the court can do that, it must appear that the record con-

tains all of the evidence on which the cause was tried in the court below. Such of it as is not returned with the report of the referee, so as to form a part of the record, under § 5064 of the Code, must be contained in a statement of facts, settled and certified by the judge before whom the cause is pending or was tried. It cannot come here over the certificate of the clerk.

As the evidence is not before us, we cannot review the findings of fact, and, as it is not questioned that these, as found, support the judgment, it follows that the judgment must stand affirmed, and it is so ordered.

[No. 4659. Decided November 10, 1903.]

AUSTIN CORBIN, 2ND, *et al.*, *Appellants*, v. THOMAS
McDERMOTT *et al.*, *Respondents*.¹

APPEAL—REVIEW—OBJECTION TO REPORT OF COMMISSIONERS—
WAIVER. A motion to set aside a commissioners' report, upon the ground that the same is not in due form or according to law, not called up or disposed of below, is waived by going to trial on the merits, and will not be considered on appeal.

SAME—CONFIRMATION OF COMMISSIONERS' SURVEY—EVIDENCE
NOT BROUGHT UP. The confirmation of the report of commissioners appointed to survey a disputed boundary line, after a hearing upon oral and written evidence, will not be reviewed on appeal where the evidence is not brought up.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered November 24, 1902, upon findings in favor of the defendants, confirming the report of commissioners establishing a boundary line, after a trial on the merits before the court without a jury. Affirmed.

¹Reported in 74 Pac. 361.

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W. S. Gilbert, for appellants.

Myers & Warren, for respondents.

PER CURIAM.—This action was begun originally by appellants Corbin and Peyton to obtain a permanent injunction restraining respondents from trespassing upon certain lands described in the complaint. The appellant Minard was afterwards made a party plaintiff by stipulation. In the course of the proceedings, a dispute arose as to the true boundary line between the land of the appellants and that owned by the respondent McDermott, whereupon the respective parties entered into a stipulation agreeing, among other things, that the trial court should appoint three disinterested persons as commissioners to survey, establish, and properly mark the true boundary line between such lands. Upon the filing of this stipulation the court appointed three commissioners, directing them to make a survey of the boundaries in question, and to file a report, a plat of their survey, and field notes of the same. The commissioners made and brought into court a report of their doings, to which the appellants filed written exceptions, and moved the court to set the report aside upon the ground, among others, that the same was not in due form or according to law. This motion was never called up or disposed of. Afterwards the cause went to trial upon the merits, and resulted in a finding and decree of the court fixing the boundary line in accordance with the report of the commissioners.

On this appeal the appellant assigned as error: (1) That the court erred in refusing to set aside the report of the commissioners because not in due form or according to law; and (2) the court erred in confirming the report of the commissioners. We are of the opinion, however, that these assignments are not now open to the appellants.

Objections which go to form, and not to the merits of a controversy, must be called up and passed upon prior to the time the merits are tried, if they are to avail the party objecting. A party cannot play fast and loose with the court. He cannot reserve his objections to the form of the proceeding until he obtains the court's opinion upon the merits of the controversy, and then urge the objections if that opinion be adverse to him, or waive them if the opinion be in his favor. Failing to insist upon objections of this character before going to trial on the merits amounts to a waiver of the objections, and when such objections are once waived they cannot be revived at the mere will of the party making them.

The second objection is equally untenable. The court affirmed the report after a hearing at which both oral and written evidence was introduced. This evidence is not before us. Whether, therefore, the court erred in its ruling cannot, for that reason, be considered here.

The judgment is affirmed.

[No. 4511. Decided November 10, 1903.]

ROBERT KRUEGEL, *Appellant*, v. JUDSON KITCHEN *et al.*,
Respondents.¹

CONTRACTS—ABROGATING BY NEW AGREEMENT—BURDEN OF PROOF—DAMAGES. While the burden is upon the defendants to show a new agreement abrogating a contract for the purchase of brick of certain quality at a specified price, whereby an inferior quality at a fair price was substituted, the difference in price need not be shown with absolute precision, nor would the damages be restricted to the increased cost of laying the inferior brick, since compensation is the fundamental principle of damages.

¹Reported in 74 Pac. 373.

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COSTS—TENDER—PAYING OUT OF DEPOSIT IN COURT. In an action to foreclose a lien, where the defendants' tender has been paid into court, it is discretionary, in giving judgment against the plaintiff for costs, to order the same paid out of the deposit in court.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered May 24, 1902, upon findings in favor of the defendants, after a trial on the merits before the court without a jury. Affirmed.

Harvey & Welty and Thomas Neill, for appellant.

John W. Mathews, for respondents.

PER CURIAM.—This was an action instituted in the superior court in the county of Whitman by appellant, Robert Kruegel, against Judson Kitchen, H. B. Treff, Pullman State Bank, a corporation, and the Equitable Savings & Loan Association, respondents, to enforce a lien for material (brick) furnished by him in the construction of a certain one-story brick building situated on a part of lot one, block fourteen, in the town of Pullman, in Whitman county, of which respondent the Pullman State Bank was the owner and reputed owner. Appellant alleges there was due \$1,035.30, the value of the brick, less \$592.50 theretofore paid, leaving a balance of \$442.80, which he claimed with interest together with attorney's fees and costs of suit.

The answer of respondents contains denials of the material allegations of the complaint, and affirmative matter alleging a subsequent modification of the contract sued on. It admits an indebtedness of \$194, and alleges a tender before the filing of the lien and commencement of the suit, which was kept good by bringing the same into court. The reply makes certain denials and admissions, and alleges a refusal to accept the tender. On May 24th,

1902, the cause came on for trial, at the conclusion of which the court found for the respondents on all of the issues, directing that the costs \$64.70 be taxed against appellant, and ordering the same paid out of the amount deposited in the registry of the court. Appellant excepted to certain of the findings of fact and all the conclusions of law made by the court, and also to the refusal to make certain other findings and conclusions of law as requested by him, and prosecutes his appeal to this court.

Appellant makes eight assignments of error, principally directed towards the findings of fact made by the court and the refusals to find as requested by him. The trial court found on the main issues as follows:

"(3) That in the month of August, 1901, the defendant Judson Kitchen entered into a verbal agreement with the plaintiff, whereby the plaintiff was to furnish and to deliver to the defendant Judson Kitchen, in the city of Pullman, said county of Whitman, sufficient good bricks with which to construct that certain one-story brick building now situated upon lot one, block fourteen (except that portion thereof in the southwest corner, which is 25 by 100 feet, and is occupied by the Pullman State Bank building), in the Town of Pullman, Whitman Co., State of Washington, and the bricks when delivered were to be good bricks, and such bricks as would be acceptable to the defendants the Pullman State Bank and H. B. Treff, for the sum of \$8.50 per thousand.

"(4) That thereafter, on or about the ——— day of August, 1901, the plaintiff commenced to deliver bricks under and by virtue of the said verbal agreement, and after having delivered about eight or ten thousand, the defendants Judson Kitchen, the Pullman State Bank, and H. B. Treff discovered that the bricks which the plaintiff had delivered were not good bricks, and were not such bricks in quality as the plaintiff had agreed to deliver at \$8.50 per thousand, because many of them were absolutely worthless, and at least one-third of them were bats or

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parts of bricks; and thereupon the defendants Judson Kitchen and the Pullman State Bank and H. B. Treff then and there informed the plaintiff that they would not accept the bricks which had been delivered, nor any more of the same kind, at the agreed price of \$8.50 per thousand. Thereat the plaintiff agreed to deliver the best brick that he had, and to receive and accept as pay therefor the reasonable value thereof, including the bricks which had then been delivered; and in compliance with said second verbal agreement, which said agreement was in abrogation of the first agreement, the plaintiff did thereafter deliver 121,000 bricks (including a portion of those which had been delivered under the first agreement), of which 121,000 bricks so delivered by the plaintiff one-third thereof were bats and pieces of bricks.

“(5) That said one hundred twenty-one thousand bricks (including bats and pieces of bricks) were of the reasonable value of six dollars and fifty cents per thousand, and no more.”

The court further found, that the value of the brick delivered by appellant was \$786.50, on which there had been made a payment of \$592.50; that, before the filing of the alleged lien and the commencement of the action at bar, the sum of \$194 was tendered by respondent H. B. Treff, the principal contractor of appellant; and found the appellant's refusal to accept the same, and its deposit in the clerk's office for appellant's benefit.

After carefully reading and considering all the testimony, in connection with the arguments of counsel, we are of the opinion, that the findings of fact as to the material issues tendered are fully sustained by the evidence; that the first contract between appellant and respondent Kitchen, entered into on or about August 6th, 1901, for the sale and delivery of the brick in question, wherein the price was fixed at \$8.50 per thousand, was afterwards abrogated; that the 9,000 or 10,000 brick which had already been de-

livered were not of the value and quality originally contracted for; that a second and subsequent contract was entered into between the parties fixing the price of the brick to be thereafter furnished, including those already delivered, at their reasonable value, and that this was an abrogation of the first agreement and the substitution of a new one in its stead; that the testimony warranted the court in fixing such value at \$6.50 per thousand, which is consistent with the other findings of fact and the conclusions of law made and stated by the superior court.

We agree with appellant's contention that the burden of establishing the affirmative defense with regard to the new agreement was with respondents, but we cannot hold that they failed in that regard without manifestly disregarding the weight of the evidence. The brick contained so many bats, and were so different in kind and quality from marketable material generally used in the construction of a substantial building, that it is not a fair estimate of their value to consider alone the difference in cost of laying them. Nor were the respondents required to show, with absolute precision, the value of the brick delivered at the town of Pullman at the times alleged. Compensation is the fundamental principle of the law of damages, not necessarily to be shown with precision and accuracy, but approximately; (8 Am. & Eng. Enc. Law [2d ed.], 544, 545; *Whelan v. Lynch*, 60 N. Y. 469, 19 Am. Rep. 202; *Muser v. Magone*, 155 U. S. 240, 249, 15 Sup. Ct. 77, 39 L. Ed. 135;) and from the evidence it appears that the superior court made a fair and proper finding as to the compensation appellant should receive for the brick delivered.

The respondent Equitable Savings & Loan Association is not an active participant in this controversy, simply holding a mortgage or lien on the property.

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Appellant further contends that the court erred in ordering respondents' costs and disbursements paid out of the deposit made in the clerk's office. The trial court had jurisdiction over the subject-matter and parties to the action, which included the funds on deposit. In the absence of any positive rule of law, we see no just reason why a court may not exercise its discretion in a matter of this kind. Appellant furnishes us with no authority in conflict with this conclusion, and we are aware of none; therefore we regard such contention untenable.

No reversible error appearing in the record, the judgment of the superior court should be affirmed, and it is so ordered.

[No. 4484. Decided November 10, 1903.]

DANIEL O'CONNOR, *Respondent*, v. HUGH JACKSON *et al.*,
Appellant.¹

COMMUNITY PROPERTY—ORAL SALE BY HUSBAND—POSSESSION OF PURCHASER—PAYMENT—NOTICE TO WIFE PRESUMED—SPECIFIC PERFORMANCE. Where a husband and wife are in the actual possession of community realty, and place a purchaser in possession under an oral agreement of sale made by the husband alone, the consideration paid by the purchaser is presumed to move to the community and the assent of the wife is presumed until the contrary is made distinctly to appear; and specific performance may be decreed without showing the wife's knowledge of the oral agreement, where there is nothing to overcome such presumption.

LANDLORD AND TENANT—DISPUTING TITLE OF LANDLORD. A tenant in possession can acquire no interest by quitclaim deed as against his landlord.

Appeal from a judgment of the superior court for Klickitat county, A. L. Miller, J., entered April 21, 1902, upon

¹Reported in 74 Pac. 372.

findings in favor of plaintiff, after a trial upon the merits before the court without a jury. Affirmed.

W. B. Presby, for appellants. The contract to sell community realty made by the husband alone was void. *Holyoke v. Jackson*, 3 Wash. T. 235, 3 Pac. 841; *Hoover v. Chambers*, 3 Wash. T. 26, 13 Pac. 547; *Colcord v. Leddy*, 4 Wash. 791, 31 Pac. 320; *Graves v. Smith*, 7 Wash. 14, 34 Pac. 213. Specific performance should not be granted upon parol evidence and part performance except upon clear, satisfactory, and undisputed proof. *Hazleton v. Putnam*, 3 Pin. (Wis.) 107, 54 Am. Dec. 158; *Eckel v. Bostwick*, 88 Wis. 493, 60 N. W. 784; *Wagonblast v. Whitney*, 12 Ore. 83, 6 Pac. 399; *Magee v. McManus*, 70 Cal. 553, 12 Pac. 451.

Coovert & Stapleton and *Brooks & Snover*, for respondents. The wife is estopped by accepting the fruits of the sale. *Konnerup v. Frandsen*, 8 Wash. 551, 36 Pac. 493; *Brundage v. Home Savings & L. Ass'n*, 11 Wash. 277, 39 Pac. 666; *Payne v. Still*, 10 Wash. 433, 38 Pac. 994. The oral contract of sale could not be revoked without an offer to repay the consideration received. *Frink v. Thomas*, 20 Ore. 265, 25 Pac. 717; *Cade v. Davis*, 96 N. C. 139, 2 S. E. 225; *Jennisons v. Leonard*, 21 Wall. 302; *Murphy v. Lockwood*, 21 Ill. 611; *Johnson v. Jackson*, 27 Miss. 498, 61 Am. Dec. 522; *Buchenau v. Horney*, 12 Ill. 336. Specific performance may be decreed on conflicting testimony. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Munday v. Jolleffe*, 5 Myl. & Cr. 167, 177.

PER CURIAM.—This was an action by Daniel O'Connor, respondent, against Hugh Jackson, Lottie Jackson, and Harry J. Dunn, appellants, for a specific performance of an oral contract for the sale of real estate. The case

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was before this court on a prior appeal, when we held that the demurrer interposed by the appellants to the respondent's complaint should have been sustained. 23 Wash. 224, 62 Pac. 761. After the case was remanded, the original complaint was amended, the cause put at issue, and a trial had to the court upon the merits of the controversy. The following findings of fact were made by the trial court:

"That during all of the times mentioned in the complaint on file herein, the defendants Hugh Jackson and Lottie Jackson were, and now are, husband and wife.

"That during all the times mentioned in the complaint on file herein, the defendant Harry J. Dunn was, and now is, a single man, and that the said T. L. Masters and Mary Masters were, and now are, husband and wife.

"That on the 12th day of July, 1893, the defendants Hugh Jackson and Lottie Jackson were the owners in fee of an undivided one-half interest in and to the tract or lot of real estate situated in the City of Goldendale, Washington, described as follows, to wit: Beginning at a point nineteen feet west from the northeast corner of lot 16 in block 15 of J. J. Golden's First addition to the City of Goldendale, Washington, and running thence west nineteen feet, thence south one hundred feet, thence east nineteen feet, and thence north one hundred feet to the place of beginning. That the said defendants were on said date in the actual possession of the said tract of real estate.

"That on said 12th day of July 1893, the said defendants Hugh Jackson and Lottie Jackson entered into an agreement with one T. L. Masters, by the terms of which the said Hugh Jackson and Lottie Jackson, defendants, sold and agreed to convey to the said T. L. Masters, by good and sufficient warranty deed, an undivided one-half interest in the tract of real estate described in section 3 of these findings; and the said T. L. Masters agreed with the said defendants to pay therefor the sum of \$500; that the said agreement was not reduced to writing, but the defendants Hugh Jackson and Lottie Jackson, in pursuance

of said agreement and in compliance therewith, placed the said T. L. Masters in possession of said property, and the said T. L. Masters paid the consideration of \$500 therefor, by then and there paying to the said defendants the sum of \$150 in cash, and assuming an obligation of said defendants, to wit, a promissory note in the sum of \$350, then held by one W. H. Chappell, which said obligation the said T. L. Masters thereafter paid. The said T. L. Masters, having fully paid said consideration, and performed each and every condition of said contract which was to be kept and performed by him, demanded a deed from the said defendants Hugh Jackson and Lottie Jackson, but that said defendants failed and refused, and still fail and refuse, to execute the said deed. That the said T. L. Masters continued in possession of said undivided one-half interest in said tract of real estate until the 4th day of October, 1894, when he sold the same in consideration of the sum of \$500 to this plaintiff, and then and there executed a good and sufficient deed of the same to this plaintiff, which said deed was and is of record with the auditor of said county and state in Book 12, on page 234. That upon said deed being made and delivered to this plaintiff, he, the said plaintiff, was placed in possession of the said tract of real estate, and has ever since said date so remained in possession of the same, and is in possession thereof.

"That on the 23d day of May, 1899, the said defendants Hugh Jackson and Lottie Jackson executed a quit-claim deed of said premises to the defendant Harry J. Dunn, which said deed was, on the ——— day of May, 1899, filed for record and recorded in the office of the auditor of Klickitat county, Washington, on page 582 of Book K of the deed records of said county. That at the date of the execution of said deed the defendant Harry J. Dunn was occupying said premises as the tenant of this plaintiff, under a written lease from plaintiff and the owner of the other undivided one-half interest thereof. That said defendant Dunn well knew at the date of the execution and acceptance of said deed that this plaintiff was the

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owner of said real estate, to the extent of an undivided one-half interest therein.

"That the said deed executed by the said defendants Hugh Jackson and Lottie Jackson to the defendant Harry J. Dunn is a cloud upon the title of this plaintiff."

The court, on these findings, made appropriate conclusions of law, and entered judgment in conformity therewith. The appellants proposed certain findings and conclusions, which the court refused to make; and they bring the case here upon their exceptions to findings and conclusions made, and the refusal of the court to make the proposed findings and conclusions.

After a careful examination of the record, in connection with the arguments of the respective counsel, we are of the opinion that the essence of this controversy, from the standpoint of appellants, is presented by the first point made in their brief:

"It is conceded that this was community property of Hugh Jackson and Lottie Jackson. It is stipulated that Hugh Jackson made some oral agreement with T. L. Masters for the conveyance of this property to Masters. It does not appear that Lottie Jackson joined in any such oral agreement, or had any knowledge of such oral contract, or assented to any such contract. On the contrary, the testimony throughout tends to show that she never had knowledge of, joined in, or assented to such contract."

There is ample testimony in the record showing, that Masters, the vendee, entered into possession of the real estate in question by virtue of the oral contract made with appellant Hugh Jackson; that the consideration for such purchase was \$500, and was paid by Masters in the manner stated by the trial court in its findings; that he continued in possession thereof till October 4, 1894, when he (Master's) and wife conveyed their interest in the property to respondent Daniel O'Connor; that respondent was

placed in possession of the real estate by his grantors; that such possession was continuous till the commencement of the present action; that appellants Hugh and Lottie Jackson conveyed the said real estate to appellant Harry J. Dunn by a warranty deed on the 23d day of May, 1899; that Dunn was at that time the tenant of respondent, and of the owner of the other half interest in such property; and that Dunn then had full knowledge of respondent's rights therein.

It also appeared from the evidence, that about the middle of September, 1893, Masters endeavored to procure the deed of this real estate from the Jacksons, who were willing to execute the instrument, but, under advice of an attorney, it was then deemed advisable to procure the signatures of two other parties to the conveyance in connection with the Jacksons as grantors; that such parties refused to join in the execution of the deed till some unsettled accounts were adjusted between them and appellant Hugh Jackson; and that Masters, while he was in possession of the property, after payment of the purchase money, demanded the deed from appellant Hugh Jackson, but was unable to procure it.

We think that under the testimony the consideration of \$500 for the purchase of the real estate moved to the community (Hugh and Lottie Jackson); and such is the presumption, nothing appearing to the contrary in the record, under our statutory provisions concerning community property and community interests. We have held that the presumption, when a promissory note is executed by the husband, is that it evidences a community debt. *Reed v. Loney*, 22 Wash. 433, 61 Pac. 41. If this be correct, the converse of the proposition must be equally true—that where a party assumes and discharges a community obliga-

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Citations of Counsel.

tion, or pays money for its benefit at the instance of either spouse, the assent of both members of the community is presumed until the contrary is made distinctly to appear. There is nothing in this record to overcome this presumption as between the Jacksons, appellants, and T. L. Masters. The finding of the trial court that the conveyance from Jackson and wife to appellant Harry J. Dunn was a quitclaim instead of a warranty deed does not affect the merits of the controversy in the least. Dunn took nothing by his deed as against respondent.

No error appearing in the record warranting a reversal of the judgment of the superior court, it must therefore be affirmed, and it is so ordered.

[No. 4617. Decided November 10, 1903.]

J. W. YOUNG, *Respondent*, v. SEATTLE TRANSFER COMPANY, *Appellant*.¹

WAREHOUSEMAN—LOSS OF GOODS—CONTRACTS BY TELEPHONE—EVIDENCE—SUFFICIENCY. In an action for the value of a trunk claimed to have been stored with a transfer company, a verdict for the plaintiff is not supported by any evidence where the only proof tending to show the receipt of the trunk was the fact of a telephone order for its removal and storage, given to defendant's number and answered by an unidentified person who stated it was the defendant, and that an unidentified expressman removed the trunk.

Appeal by defendant from a judgment of the superior court for King county, Bell, J., entered October 15, 1902, upon the verdict of a jury rendered in favor of the plaintiff for the sum of \$240 damages for conversion. Reversed.

Metcalf & Jurey, for appellant. The presumption that the defendant received the telephone order for the

¹Reported in 74 Pac. 375.

trunk cannot be made the basis for another presumption that it called and removed it. 22 Am. & Eng. Enc. Law, p. 1236 (2d ed.); Lawson, Presumptive Evid. 569; *Manning v. John Hancock Ins. Co.*, 100 U. S. 693, 25 L. Ed. 761; *United States v. Ross*, 92 U. S. 281, 23 L. Ed. 761; *McAleer v. McMurray*, 58 Pa. St. 126; *Douglass v. Mitchell's Ex'r*, 35 Pa. St. 440; *Glick v. Kansas City, etc. R. Co.*, 57 Mo. App. 97; *Moore v. Missouri Pac. R. Co.*, 28 Mo. App. 622; *Richmond v. Aiken*, 25 Vt. 324; *Adm'r of Hammond v. Smith*, 17 Vt. 231; *Pennington's Ex'r v. Yell*, 11 Ark. 212, 52 Am. Dec. 262; *Danley v. Rector*, 10 Ark. 211, 50 Am. Dec. 242; *Missouri Pac. R. Co. v. Porter*, 73 Tex. 304, 11 S. W. 324; *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969.

Ballinger, Ronald & Battle, for respondent, cited 25 Am. & Eng. Enc. Law, 885.

PER CURIAM.—This was an action begun in the superior court of King county by respondent, J. W. Young, for the recovery of the value of a trunk and contents alleged to have been stored in the month of August, 1898, with appellant, Seattle Transfer Company. The answer was a general denial, except as to the incorporation of appellant, the character of its business, and the demand for the trunk. The cause was tried to a jury in the superior court, a verdict was rendered in favor of respondent against appellant for \$240, and judgment was entered on the verdict for that amount and costs, from which it appeals to this court.

At the trial, after respondent rested, appellant moved for a nonsuit, which was denied. Appellant thereupon submitted its evidence, and after the rendition of the verdict moved the court for a new trial, which was overruled. Appellant excepted to each ruling in denying its request for a nonsuit and its motion for a new trial. The assign-

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ment of error presents the sole question in the case, was there evidence to support the verdict of the jury?

Under the issues, as formulated by the pleadings, the burden of proof was cast upon respondent to show by some testimony that the Seattle Transfer Company undertook to receive and place in storage, for a consideration, in one of its warehouses at the city of Seattle, respondent's trunk and contents, and that in pursuance of such agreement appellant did receive said goods for that purpose. The evidence bearing on these propositions, adduced at the trial on behalf of respondent and appellant, may be summarized as follows: Respondent and one Ramsay, in February, 1898, jointly occupied a room at the Yesler residence in Seattle. Respondent, intending to go to Alaska, placed certain of his wearing apparel in said trunk, then in the Yesler residence in the custody of Mr. Ramsay, to remain in the room they were jointly occupying until Mr. Ramsay should desire to move from said place, in which event he was instructed by respondent to store the trunk with appellant company; that some time during the month of August, 1898, Ramsay, intending to remove from the Yesler residence, attempted to communicate with the appellant about the storage of the trunk on two different occasions. At the trial the circumstances regarding such communications were related by Ramsay in his direct examination in the following language:

"I rang up the Seattle Transfer Company and told them to send up and get Mr. Young's trunk at the Yesler home, where we were rooming, and take it down and put it in storage for Mr. Young; and somehow they didn't send up for the trunk that day; so when I went back to my room that night I found the trunk hadn't been sent for; so the following day I telephoned again to the Seattle Transfer Company, and told them I would like for them to send up and get that trunk right away; that I wanted

to move, and would like for them to take care of it; and they said they would send a man up to attend to it that day; so when I went back home that evening I found the trunk had been called for and taken away."

This witness also testified in this connection, in response to questions propounded by respondent's counsel, in the following manner:

"Q. You don't know, of course, who it was at the other end of the line that you were talking to? A. No, I do not. Q. How did you— Just explain to the jury what you did, now, about reaching the office of the Seattle Transfer Company. A. Well, I did in that case the same as I would do in any other—just simply looked up the number in the directory, and rang up and inquired if that was the Seattle Transfer Company. Q. What reply did you get? A. They replied that it was. So then I requested them to send up and get the trunk."

Ramsay, on cross-examination, testified, that he telephoned from Newhall's store down town in Seattle each time; that he did not recognize the voice of the person addressed at either time; that he did not recollect the number of the telephone he called up, and did not know who took the trunk away from the house. Mrs. Emma Gagle, who lived at the Yesler residence at that time, testified: "I know that the trunk was taken from the Yesler residence. I don't know the party's name who took it, but I do know it was an expressman. I don't know where the trunk was taken." No check or receipt for the trunk was ever asked for or received by Ramsay or Mrs. Gagle from the appellant or the expressman who removed the trunk. The respondent at that time was in Alaska.

In the spring of the year 1900, Young wrote Ramsay from Alaska, requesting him to go to the transfer company and get his trunk, pay the storage charges, and send it to him. Ramsay, pursuant to such request, went to the office

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of appellant, and after diligent search the company was unable to find any trace of the trunk or its contents, either by consulting its books or by searching through its warehouse. Respondent testified that he left Seattle for Alaska in February, 1898, corroborated Mr. Ramsay with regard to leaving the trunk and contents with him, and authorizing him to store same with appellant; and testified further, that he never at any time saw the trunk in the possession of the transfer company; that he personally had had no agreement with the company concerning the trunk, but had left the matter in Ramsay's hands; that, on his return from Alaska, he went to the office of appellant and had a conversation concerning the trunk with Mr. Shaubut, in charge of the baggage department of the transfer company. Respondent testified: "We went down into the storage room to see if witness could pick out the trunk, and were unable to find it. Mr. Shaubut claimed that the company did not have it." The date of this conversation and search was not definitely fixed by Mr. Young, but Mr. Shaubut, testifying on behalf of appellant, said it was about one year prior to the trial of the cause, thereby fixing the date about June 12, 1901.

On behalf of appellant the testimony tended to show, that no record was ever made with reference to the trunk; that thorough search was had and no trace of it or its contents could be found; that the company, in the month of August, 1898, did an extensive storage and transfer business; that mistakes had sometimes occurred in handling merchandise; that the three witnesses examined on behalf of appellant, who were at that time agents and officers of the transfer company, had no knowledge or recollection of the communications over the telephone alleged to have been made by Ramsay; witness Shepard testifying, that in the

month of August, 1898, he was clerk in the office of appellant company, that it was his business to receive orders communicated over the telephone, and that while he happened to be out of the office attending to the company's affairs some one else might answer calls at the telephone.

The appellant contends that the evidence produced at the trial failed to show that the trunk and contents in question ever came into the possession of the Seattle Transfer Company by virtue of any contract or arrangement made or had with respondent, or in any other manner. The *onus probandi* was upon respondent at the trial as to the issues tendered by him, above noted. The jury, having rendered a verdict in respondent's favor, must necessarily have found that the trunk and contents came into appellant's possession by virtue of some contractual relation entered into between some agent of appellant and Mr. Ramsay, representing the respondent. Verdicts of juries as well as findings of courts, in determining questions of fact, must be based upon testimony. *Reidhead v. Skagit County*, ante, p. 174, 73 Pac. 1118.

When material to the issues, communications through the medium of the telephone may be shown in the same manner, and with like effect, as conversations had between individuals face to face, but the identity of the party sought to be charged with a liability must be established by some testimony, either direct or circumstantial. It is not always necessary that the voice of the party answering, or of either party, for that matter, be recognized by the other in such conversations, but the identity of the person or persons holding the conversation, in order to fix a liability upon them or their principals, must in some manner be shown. To hold parties responsible for answers made by unidentified persons, in response to calls at the tele-

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phone from their offices or places of business concerning their affairs, opens the door for fraud and imposition, and establishes a dangerous precedent, which is not sanctioned by any rule of law or principle of ethics of which we are aware. A party relying or acting upon a communication of that character takes the risk of establishing the identity of the person conversing with him at the other end of the line.

The able counsel for respondent argue that the case at bar presents the question as to the weight of evidence—that the jury having found in respondent's favor on these issues, the court will not interfere. On that branch of the case, relating to communications over the telephone as evidence, our attention is directed to 25 Am. & Eng. Enc. Law, p. 885 (1st ed.), where the following language is used:

“There may be cases, however, in which the fact that the voice is not recognizable, and that neither party can be absolutely sure of the identity of the person conversing with him, may necessitate the application of exceptional rules.”

Several cases are cited in the foot note in support of this proposition. *Wolfe v. Missouri Pacific Ry. Co.*, 97 Mo. 473, 11 S. W. 49, 3 L. R. A. 539, 10 Am. St. 33, was an action brought by plaintiffs (respondents) against the company (appellant) to recover damages for breach of a contract for the carriage and delivery of merchandise. At page 477, Barclay, J., delivering the opinion of the court observes: “In the progress of the trial the court admitted testimony of alleged conversations by telephone connected with plaintiff's office, though the witness did not identify the voice he heard at their instrument.” The opinion states subsequently that there was ample testimony to support the finding of the trial court, and that its instructions were correct; and then proceeds to remark: “A

question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between some one at the instrument in plaintiff's private office and the witness." It is significant that the subject matter of the conversation is not discussed by the court. The language, in connection with facts of the case as shown by the decision, would imply that the alleged communication was not very material to the issues, as the court remarked further on: "The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission."

In the controversy at bar, appellant does not question the admissibility of Ramsay's alleged conversations over the telephone with reference to the trunk, but contends that they fail to connect appellant with the transaction.

The case of *Globe Printing Co. v. Stahl*, 23 Mo. App. 451, bears more directly on the propositions discussed by the respective counsel in the case at bar. The action was brought by the printing company (respondent) against Stahl (appellant) for the purpose of collecting a debt. The facts appear in the opinion of the court at page 452, and are thus stated:

"The sole question which arises upon the record is whether the court erred in admitting evidence of a conversation had through a telephone between the plaintiff's bookkeeper and a person who answered to the defendant's name. The bookkeeper testified that he called up by telephone to the general office of the Bell Telephone Company for the defendant's number, and was, by the central office, connected therewith; that the list of the telephone company showed that the defendant had two telephones, one at his undertaking establishment on Franklin avenue, in the city of St. Louis, and another at his livery stable, on Olive street; that witness was not certain which number he

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called, but that his best recollection was that it was the Olive street number; that there was an answer from the defendants' number to the telephone call; that he (the witness) did not know whose voice it was, and does not now know; that the witness did not know the defendant's voice and did not know the defendant, but that he asked, through the telephone, if that was Stahl (the defendant) and the answer was 'Yes.' The witness was then asked to give the conversation then had through the telephone with the party answering the call. In response to this question the witness testified, against the objection of the defendant, 'that he asked why defendant did not pay the bill for which this suit was brought, and that the party answering said, "All right; I will attend to the matter about the first of the month."' A previous witness had testified for the plaintiff to a conversation through the telephone in a similar manner with the defendant, whose voice the former witness identified."

The court ruled that the testimony was admissible. In that case it appeared that the bookkeeper of respondent identified Stahl by first inquiring if it were he who answered the call at the telephone. Receiving an affirmative response, he talked with Stahl about the debt for which suit was brought; though Stahl's voice was not recognized, still it should be borne in mind that the alleged conversation related to prior dealings had between the parties to the litigation. It further appears that a previous witness, who recognized the voice, had testified to a conversation had with Stahl over the telephone. The court very properly held that the testimony was admissible. While it appears in the case 'at bar that neither respondent nor Mr. Ramsay had any previous dealings with the appellant concerning the trunk in question, Ramsay did not, on either of the occasions named, make any effort to identify the party or parties.

The facts in the other cases cited by the author were so dissimilar to those presented in this controversy we deem it unnecessary to comment upon them. The respondent offered no evidence to supply "the missing link" in that regard. The jury was permitted to guess, and base its findings thereon, that some agent or employe of the appellant answered witness Ramsey's communications, or at least one of them; that in pursuance thereof an employe of the transfer company, who was unknown and unidentified by the testimony, called and removed the trunk from the Yesler residence. This is not a question as to the weight of evidence, but one of failure of proof on material issues tendered by respondent and denied by appellant. A verdict based on such considerations cannot stand.

We are therefore of the opinion that the trial court erred in denying appellant's motions for a nonsuit and for a new trial, that the verdict of the jury was not sustained by the evidence, that the judgment of the superior court should be reversed, and the case remanded with directions to dismiss the action, and it is so ordered.

[No. 4559. Decided November 16, 1903.]

W. H. WOODCOCK, *Appellant*, v. G. O. GUY, *Respondent*.¹

TRADE-MARKS—REGISTRATION—INFRINGEMENT—COMPLAINT. A complaint for the infringement of a trade-mark which fails to allege that it was registered in accordance with Bal. Code, § 3621, must state a case for equitable relief at common law.

SAME—FRAUD NECESSARY AT COMMON LAW. At common law a demurrer to a complaint to enjoin the infringement of plaintiff's trade-mark "Gargline" for a throat medicine, by defendant's use of "Gargeline" for the same purposes, is properly sustained where there is no allegation of fraudulent conduct, or that the same was

¹Reported in 74 Pac. 358.

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Citations of Counsel.

printed in a particular manner calculated to mislead the public, or that the public was deceived, or that the plaintiff sustained any damage.

SAME—NOTICE TO DISCONTINUE USE—INJUNCTION. Nor would such a complaint be sufficient to authorize an injunction without alleging the facts respecting service upon the defendant of notice to discontinue such infringement, and an allegation that such a letter was written to defendant without proof that it was received is insufficient.

Appeal from a judgment of the superior court for King county, Tallman, J., entered October 11, 1902, upon sustaining a demurrer to the complaint, dismissing an action for the infringement of a trade-mark. Affirmed.

Stafford & Dawes, for appellant. Injunctive relief against the infringement is given irrespective of any pecuniary damage. 3 Pomeroy, Equity Jurisp. § 1354; *Clark Thread Co. v. Wm. Clark Co.*, 55 N. J. Eq. 658, 37 Atl. 599; *Browne*, Trade-Marks, § 501 (2d ed.); *Hennessy v. Wilmerding-Loewe Co.*, 103 Fed. 96. The right of action rests upon the common law. *Trade-Mark Cases*, 100 U. S. 82; *Welsbach Light Co. v. Adam*, 107 Fed. 463. Registration is not necessary. *Shaver v. Shaver*, 54 Iowa 208, 6 N. W. 188; *Smith v. Walker*, 57 Mich. 456, 22 N. W. 267, 24 id. 830, 26 id. 783; *Small v. Sanders*, 118 Ind. 105, 20 N. E. 296. The right of action is fully established by showing a valid trade-mark and its infringement. *McLean v. Fleming*, 96 U. S. 245; *Collins v. Ames etc. Corporation*, 20 Blatch. 542; *Hostetter v. Vowinkle*, 1 Dillon 329; *California Fig S. Co. v. Improved Fig S. Co.*, 51 Fed. 296; *Jennings v. Johnson*, 37 Fed. 364; *Weinstock etc. Co. v. Marks*, 109 Cal. 529, 42 Pac. 142, 50 Am. St. 57, 30 L. R. A. 182. It is not necessary to show fraud. *Davis v. Kendall*, 2 R. I. 566; *Partridge v. Menck*, 2 Barb. Ch. 101; *Hier v. Abrahams*, 82 N. Y. 519; *McLean v. Fleming*, *supra*. Fraudulent intent will be presumed from

the facts alleged. *Heinisch v. Boker*, 86 Fed. 767; *Societe Anonyme etc. v. Western Distilling Co.*, 43 Fed. 416; *Putnam Nail Co. v. Bennett*, 43 Fed. 800. It is not necessary that any one be deceived. *Fuller v. Huff*, 104 Fed. 141. When there is no dispute as to the facts, the court is to determine the question of infringement. *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 70 Conn. 516; *N. K. Fairbank Co. v. Lukel etc. Soap Co.*, 102 Fed. 327; *Welsbach Light Co. v. Adam*, *supra*. In the case of a coined word the infringement is always determined by the court. *Hier v. Abrahams*, *supra*; *Estes v. Leslie*, 29 Fed. 91; *Celluloid Mfg. Co. v. Cellonite Mfg. Co.*, 32 Fed. 94; *Leonard v. Whites Golden L. Co.*, 38 Fed. 922. The complaint in this case is sufficient. *Walton v. Crowley*, 3 Blatch. 440; *Moxie Nerve Food Co. v. Beach*, 33 Fed. 248; *Hostetter v. Vowinkle*, *supra*.

Fred H. Peterson, for respondent. The plaintiff should have alleged pecuniary damage. *Rand McNally & Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77; *Carson v. Ury*, 39 Fed. 777, 5 L. R. A. 614; *Gorham Mfg. Co. v. Emery etc. Co.*, 92 Fed. 774. There should be notice and a request to desist, before an injunction will issue. *McLean v. Fleming*, 96 U. S. 245; *Browne, Trade-Marks*, § 43 (2d ed.); *Simmons Med. Co. v. Mansfield Drug Co.* 93 Tenn. 84, 23 S. W. 165. There can be no trade-mark in the mere name "Gargline". *Caswell v. Davis*, 58 N. Y. 223; *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Canal Co. v. Clark*, 13 Wall. 311; *Carson v. Ury*, *supra*. *Coats v. Holbrook*, 2 Sanf. Ch. (N. Y.) 599; *Cigar Makers etc. Union v. Conhaim*, 40 Minn. 243, 41 N. W. 943; *Brown Chemical Co. v. Meyer*, 31 Fed. 453; *S. C.*, 139 U. S. 540, 11 Sup. Ct. 625; *Falkinburg v. Lucy*, 35 Cal. 52, 95 Am. Dec. 76; *Schmidt v. Brieg*, 100 Cal. 672, 35 Pac. 623;

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Royal Baking Powder Co. v. Davis, 26 Fed. 293; *Rumford Chemical Works v. Muth*, 35 Fed. 524, 1 L. R. A. 44; *Taylor v. Gillies*, 59 N. Y. 331, 17 Am. Rep. 333; *Leclanche Battery Co. v. Western Electric Co.*, 23 Fed. 276; *Wilcox Sewing Machine Co. v. The Gibbon's Frame*, 17 Fed. 623; *Lamont v. Leedy*, 88 Fed. 72; *Goodyear's India Rubber etc. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166; *In re Meyerstein's Trade-Mark*, 43 Ch. Div. 604; *Burton v. Stratton*, 12 Fed. 150; *Colgan v. Danheiser*, 35 Fed. 150; *Hier v. Abrahams*, 82 N. Y. 519; *Putnam Nail Co. v. Bennett*, 43 Fed. 800.

PER CURIAM. — Appellant, W. H. Woodcock, commenced this action in the superior court of King county against respondent, G. O. Guy, praying injunctive relief against the infringement of an alleged trade-mark by respondent, and for an accounting of profits. The respondent interposed a general demurrer to the complaint, which was sustained by the trial court. The appellant elected to stand on his pleading, and the court dismissed the action with costs against appellant, who appeals to this court. There is but one assignment of error—that “the court erred in sustaining the demurrer.” Omitting name of court and title of cause, the complaint is as follows:

“The plaintiff complains and alleges: (1) That more than twenty years ago the plaintiff coined and adopted the word ‘Gargline’ as a symbol and trade-mark for a medicinal preparation devised and compounded by him as a remedy for sore throat, tonsilitis and other affections of the mouth, gums and throat. (2) That for more than twenty years last past the plaintiff has constantly used, and still uses, said coined word ‘Gargline’ to distinguish and identify his said medical preparation. (3) That, through all the years since said coining and adopting of said trade-mark, the plaintiff has expended money in advertising the

medicinal remedy designated thereby, and has used various other means to make the merits thereof known to the public. (4) That, as a result of said advertising and other efforts by the plaintiff, his said medicinal preparation has become extensively and favorably known to the public under the name of said coined word 'Gargline,' securing to the plaintiff a large sale thereof. (5) That some time about two years ago, in the city of Seattle, the defendant began using the word 'Gargeline' to designate a medicinal preparation compounded and sold by him designed and alleged to be a remedy for the same ailments for which plaintiff's 'Gargline' is and has long been known as an effective remedy. (6) That as soon as plaintiff learned of the defendant's said use of the word 'Gargeline,' plaintiff procured his lawyers to write a letter to defendant notifying him of plaintiff's trade-mark in the word 'Gargline' and requested him to discontinue using the word 'Gargeline' on the ground that it infringed plaintiff's said trade-mark. (7) That immediately thereafter defendant ceased to exhibit conspicuously in his place of business in Seattle bottles containing his said medicinal preparation designated 'Gargeline,' and plaintiff was thereby led to believe, and did believe, that defendant had heeded said notice written him by plaintiff's lawyers and had ceased using said word 'Gargeline' to designate a medicinal preparation compounded by him. (8) That plaintiff has recently learned that defendant is still selling his said medicinal preparation under the designation 'Gargeline.' (9) That defendant's said use of the word 'Gargeline' is an infringement of plaintiff's trade-mark in the word 'Gargline.'

"Wherefore plaintiff prays for a decree of this court enjoining and restraining the defendant from using the word 'Gargeline' to designate a medicinal preparation, ordering the defendant to account for all profits made by him from the sale of a medicinal preparation designated 'Gargeline,' and for judgment in favor of plaintiff and against the defendant for the amount of such profits and the plaintiff's costs of this action."

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There is no averment in the complaint that the appellant at any time procured his alleged trade-mark to be registered in accordance with our statutory provisions. Bal. Code, § 3621, *et seq.* Therefore, the sufficiency of the complaint must be tested by the rules of the common law and the principles governing equitable relief in such cases. The right of the proprietor of a trade-mark to its exclusive use has long been recognized by the courts of England and the United States. *Shaver v. Shaver*, 54 Iowa 208, 6 N. W. 188, 37 Am. Rep. 194. The general rule adopted by the courts on this subject is, that state statutes providing for registration of trade-marks are in affirmance of the common law; that the remedies given by such statutes are either declaratory of, or are cumulative and additional to, those recognized and applied by the common law. *Derringer v. Plate*, 29 Cal. 292, 87 Am. Dec. 170; *Trade-Mark Cases*, 100 U. S. 82, 25 L. Ed. 550; 21 Enc. of Plead. & Prac. 752, 753.

The rule with reference to the granting of injunctive relief for the protection of trade-marks is thus expressed by a learned author:

“The jurisdiction rests upon fraud on the part of defendant, and upon the principle that equity will not allow one to sell his own goods under the pretense that they are the goods of another.” High on Injunctions, § 1068 (3d ed.).

In *McLean v. Fleming*, 96 U. S. 245, 24 L. Ed. 828, the principle is stated in this language: “Nor is it necessary, in order to give a right to an injunction, that a specific trade-mark should be infringed; but it is sufficient that the court is satisfied that there was an intent on the part of the respondent to palm off his goods as the goods of the complainant, and that he persists in so doing after being requested to desist.” This proposition of law is

quoted with approval by Browne, *Trade-Marks* (2d ed.), § 43. *McLean v. Fleming*, *supra*, is also authority on the proposition that a party may have the right to use his own name as a trade-mark as against a trader or dealer of a different name; but, according to the weight of authority,

"Such a party is not, in general, entitled to the exclusive use of a name, merely as such, without more. . . . Nor will any other name, merely as such, confer any such exclusive right, unless the name is printed in some particular manner in a label of some peculiar characteristics, so that it becomes to some extent identified with a particular kind of goods, or when the name is used by the party, in connection with his place of business, in such a manner that it assumes the character of a trade-mark within the legal meaning of that term, and as such entitles the party to the protection of a court of equity, to prevent others from infringing the proprietor's exclusive right."

See, also, *Coats v. Merrick Thread Company*, 149 U. S. 562, 13 Sup. Ct. 966, 37 L. Ed. 847. "The general rule is against the appropriating mere words as a trade-mark." *Hygeia Distilled Water Co. v. Hygeia Ice Co.*, 72 Conn. 646, 45 Atl. 957, 49 L. R. A. 147, and authorities cited; *Caswell v. Davis*, 58 N. Y. 223, 17 Am. Rep. 233.

Appellant contends that it was not necessary for him to allege fraud against respondent in the appropriation of his trade-mark. In support of his contentions on various phases of his case he has cited *Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589, in his printed brief, several times. That action was brought to restrain defendants from infringing upon plaintiffs' alleged right to use the word "Pride" as a trade-mark, and for damages, etc. It does not appear whether the plaintiffs had registered their trade-mark. The trial court found as facts that the defendants, well knowing the prior adoption of plaintiffs'

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trade-mark, used the same word "Pride" in the manufacture and sale of the same goods (cigars) at the same city, putting that word upon the labels and boxes of cigars of the defendants, thereby deceiving the public, and that plaintiffs were damaged. The court of appeals in that state declared the law as applied to such facts to be as follows:

"An actual intent to defraud can hardly be deemed necessary to entitle the plaintiffs to restrain the defendants from continuing the unlawful use of the plaintiffs' trade-mark whereby the plaintiffs are sustaining damage. The defendants cannot justly contend that they are entitled to continue to injure the plaintiffs' business by acts which are in violation of their legal rights, on the ground that they do not intend to defraud them."

The facts developed in that case plainly demonstrated that the defendants had knowingly invaded plaintiffs' rights, caused them damage, and "would justify an indictment, if one were necessary, that they [defendants] did so with the intent to defraud." In the case at bar, the appellant fails to allege any fraudulent conduct on the part of respondent in palming off his medicinal preparation "Gargeline" on the public as appellant's goods, or that he has suffered any injury or damage by reason of respondent having manufactured and sold his preparation, or that the public was, or is liable to be, deceived by reason of respondent's acts in the manufacture and sale of the medicinal compound "Gargeline". Appellant simply asks to be protected in the exclusive use of a word "Gargeline", which he claims to have coined and adopted as a symbol and trade-mark for a medicinal preparation, compounded by him for certain ailments of the mouth, gums, and throat. "A name alone is not a trade-mark, when it is applied to designate, not the article of a particular maker or seller, but the kind or description of thing which is be-

ing sold." *Leclanche Battery Co. v. Western Electric Co.*, 23 Fed. 277. The court held in that case that the complainants were entitled to relief against defendants, not in using a word or words, simply, but in imitating the labels of complainants. *Canal Company v. Clark* 13 Wall. 311, 20 L. Ed. 581; *In re Meyerstein's Trade-Mark*, 43 Ch. Div. 604; Paul, Trade-Marks, § 66; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.*, 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535.

Moreover, the complaint fails to show that respondent used the alleged trade-mark by stamps, labels, or otherwise, so like those used by appellant as to represent to the public that the goods of the former were, or are, those of the appellant, or that his use of the word was fraudulent in any manner. Of course, when the facts are sufficiently alleged in a pleading to show fraud, the courts will apply the law and grant the complaining party relief in all proper cases, but such conclusions cannot be based on mere hints or suggestions. *Andrews v. King County*, 1 Wash. 46, 23 Pac. 409, 22 Am. St. 136; *Rathbone v. Frost*, 9 Wash. 162 Pac. 298; 9 Enc. Plead. & Prac. 694.

The allegation of notice to respondent is not by direct statement, but by way of recital and indirection. Appellant does not allege in his complaint that respondent ever received the notice that he procured his lawyers to write, or whether the notice was served personally, or sent through the mails, or otherwise. An injunction is a harsh remedy. As a general proposition, in equity jurisprudence, it is enunciated by law writers and courts that a party seeking injunctive relief should allege in his pleading the facts upon which he bases his right to that particular remedy, in positive language. 1 High, Injunctions (3d ed.), § 34.

We have examined the authorities of appellant, with reference to the prior adoption and long continued use of a trade-name by the complaining party, when such name has been simulated by the defendant in the manufacture or sale of the goods of the same kind or quality as those of the complainant. The courts have held in cases of unfair competition that, when the words were descriptive of quality, yet if they were used in such a manner as calculated to deceive the public, it is not necessary for the complainant to show that purchasers have actually been deceived, to entitle him to relief. The case of *Fuller v. Huff*, 104 Fed. 141, 43 C. C. A. 453, 51 L. R. A. 332, doubtless goes to the full limit of the law as applied to such cases. It appeared from the statement of the facts in the opinion of the court, that the complainant remonstrated with the defendants against the use of the words, "Health Food Company," in exhibiting their goods at or near complainants stand; that the food business of defendant company was extensively advertised under that name. The court held that a case of unfair competition was established in the unlawful use of a trade-name, and granted the complainant relief. In the case at bar the appellant has failed to state sufficiently the facts in his complaint upon which any such contention can be predicated.

Testing the complaint by these rules of law, we reach the conclusion that the judgment of the superior court in this case should be affirmed, and it is so ordered.

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35	538

[No. 4605. Decided November 16, 1903.]

C. C. GRIGGS *et al.*, Respondents, v. L. MACLEAN *et al.*,
Appellants.¹

AFFIDAVITS.—**STATEMENT OF FACTS.**—**AFFIDAVITS, HOW BROUGHT UP.** Affidavits used on a motion for a new trial cannot be considered unless brought up by a bill of exceptions or statement of facts.

DISCRETION.—**SEVERAL GROUNDS.** The granting of a new trial will not be reversed if within the sound discretion of the court upon any of the grounds stated, when the record does not show on which one of several grounds it was based.

Appeal by defendants from an order of the superior court for Chelan county, Rudkin, J., entered September 4, 1902, setting aside the verdict of a jury rendered in favor of defendants July 11, 1902, and granting a new trial. Affirmed.

John D. Dill, for appellants.

C. Victor Martin and *Frank Reeves*, for respondents.

PER CURIAM.—From the transcript and briefs filed in this case, it appears that the respondents, C. C. Griggs and Alexander Griggs, commenced an action against L. Mac Lean and George Bedtelyon, appellants, in the superior court of Chelan county, for \$600 damages for keeping and maintaining a ferry cable across the Columbia river at Chelan Falls, against which one of respondents' boats collided. The cause was tried to a jury, resulting in a verdict for appellants. Respondents filed a motion for a new trial, which was granted by the trial court. Appellants excepted, and appeal to this court from the order granting

¹Reported in 74 Pac. 360.

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the new trial. Since the taking of the appeal, a written stipulation was filed in this court suggesting the death of respondent Alexander Griggs, the appointment of Etta Griggs as his administratrix, requesting the substitution of such administratrix as respondent in place of said Alexander Griggs, which has been accordingly done.

The appellants allege three assignments of error: (1) the court erred in refusing to strike from the files the affidavit of juror W. D. Reeder; (2) the court erred in considering the affidavit of W. D. Reeder; (3) the court erred in setting aside the verdict of the jury. The motion for a new trial alleges three distinct grounds: (1) the said verdict was against the law and the evidence as given upon the trial heretofore; (2) misconduct of the defendants (prevailing party) during the trial; (3) misconduct of the jury, both during the trial and while in the jury room. The order, omitting the title, is as follows:

"This case coming on regularly for hearing upon a motion of plaintiffs by their attorney, Victor Martin, for an order to vacate and set aside the verdict of the jury, and for a new trial in the above entitled action, said motion being resisted by John Dill, attorney for the defendants. After reading the affidavits filed, both by the plaintiffs and defendants, and the court being fully advised in all of the premises, it is ordered that the verdict of the jury in this case rendered July 11, 1902, be and the same is hereby vacated and set aside, and a new hearing ordered.

"Done in open court this 4th day of Sept. 1902.

"Frank H. Rudkin, Judge."

The evidence produced at the hearing is not before this court. There are certain affidavits copied in the transcript relating to acts of misconduct on the part of certain jurors, upon which the appellant contends the trial court

based its ruling in granting the new trial; but these affidavits were not made a part of the record by any bill of exceptions or statement of facts, and therefore cannot be considered on the hearing of this appeal. *Chevalier & Co. v. Wilson*, 30 Wash 227, 70 Pac. 487, and cases there cited.

On the face of the record, the case at bar comes squarely within the rule enunciated by numerous decisions of this court. In *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907, this court held that "a motion for a new trial is addressed to the sound discretion of the court and will not be interfered with on appeal unless it is manifest that the discretion vested in the court was grossly abused." After citing authorities to sustain this proposition, the court further observes:

"And where the record shows that the motion for a new trial was made on several grounds, but does not show upon which of them the ruling of the court was based, the order will not be reversed if it was within the sound discretion of the court to make it upon any of the grounds stated."

See, also, *Langston v. Ephrium*, 21 Wash. 282, 57 Pac. 808; *Newman v. Overland Pac. Ry. Co.*, 132 Cal. 73, 64 Pac. 110.

As no reversible error appears in the record, the order of the superior court granting the new trial in this case must be affirmed, and it is so ordered.

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Opinion Per DUNBAR, J.

[No. 4925. Decided November 25, 1903.]

THE STATE OF WASHINGTON *on the Relation of T. Ford Hopkins, v. HENRY L. KENNAN, as Judge of the Superior Court for Spokane County, Respondent.*¹

MANDAMUS—WITNESSES—COMPELLING ATTENDANCE OF NONRESIDENT. A judge of the superior court has no jurisdiction to compel by attachment the attendance of a nonresident witness, who is outside of the jurisdiction, for the purpose of taking his deposition, although a subpoena was served upon him while he was temporarily within the county.

Application to the supreme court, filed November 11, 1903, for a writ of mandamus directing Henry L. Kennan, as judge of the superior court for Spokane county, to issue an attachment to compel a nonresident witness to attend and give his deposition. Writ denied.

Thayer & Belt, for relator.

Post, Avery & Higgins, for respondent.

DUNBAR, J.—There is pending in the United States circuit court for the district of Washington a suit wherein T. Ford Hopkins, the relator in this application, is plaintiff, and Charles R. Smith the defendant; the same being a law action for the recovery of money. Issues of fact are made up, and the cause stands ready for trial at the next term of said circuit court. Smith was notified to appear before the Hon. Henry L. Kennan, judge of the superior court of the state of Washington in and for the county of Spokane, to give his deposition, at the instance of the relator, in the cause pending in the said circuit court of the United States. Subpoena was issued by the judge aforesaid, but the said Smith did not appear in answer to said

¹Reported in 74 Pac. 381.

subpoena, whereupon the attorney for the relator requested the court to issue a writ of attachment to compel Smith to appear and testify in said action, according to the directions of the subpoena. The court refused to issue said writ of attachment on the ground that he was without jurisdiction in the premises, and the relator applies to this court for a writ of mandamus directing said judge of the superior court to issue an attachment for the person of said Smith to require him to attend before said judge and give his deposition, and to make all orders which may be necessary or convenient in the premises in order to require said Smith to give his deposition.

It is conceded, that Smith is a nonresident living in the state of Wisconsin; that he was temporarily in Spokane City, in this state, at the time the subpoena was served upon him; and that he has now returned to his home in the state of Wisconsin. Passing by all technical questions, and conceding that the fees were properly tendered in this case, we find no authority in the statutes of this state or elsewhere sustaining the relator's contention that jurisdiction is conferred upon a superior judge of this state, or any other officer who under the laws of the state is qualified to take depositions, to compel by attachment the attendance for the purpose of having his deposition taken, of a nonresident of the state; and no legitimate deduction can be drawn from the general provisions of the statutes in relation to the exemption of witnesses distant a certain number of miles from the place where the trial is held, and the statute in relation to the taking of depositions, that would warrant the assumption of such authority on the part of the court.

This question, however, has been squarely before courts of other jurisdictions, and notably before the supreme court

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of Kansas in the case of *In re Hughbanks*, 44 Kan. 105, 24 Pac. 75. There Hughbanks, who was a resident of Osage county, went to Lyon county on business for a day, and while there was served with a subpoena issued by a justice of the peace of Lyon county, commanding him to appear before that officer four days thereafter, and give his deposition to be used in a case pending in Lyon county. He went back to his residence in Osage county, and, failing to return to Lyon county in obedience to the subpoena, was attached and adjudged guilty of contempt. Thus it will be seen that the case was exactly the same in principle as the case at bar. Held, on habeas corpus, that Hughbanks was not obliged to obey the subpoena, and that the judgment for contempt and his imprisonment thereunder were illegal.

It is said by the relator in his brief that the court in that case relied upon the fact that the proper amount of witness fees had not been tendered, which was not true in the case at bar; but this was not the theory upon which the Hughbanks case was tried. While it is true that in that case the witness had returned to his home county, and the court stated that he would be obliged to return to Emporia, the place where the court was held, and that the suggestion that he would be entitled to mileage fees for going and returning was correct, and that he would not be in contempt for the reason that such fees had not been tendered, yet the court concludes:

"In our opinion, however, the matter of tender was not involved in the proceeding, as the petitioner was not obliged to obey the subpoena, and therefore we must hold his imprisonment to be illegal."

The same principle, in effect, was decided in *Henry v. Rickets*, 11 Fed. Cas. No. 6386.

The attorney for the relator urges with great force and energy that the administration of justice will be crippled if witnesses, under such circumstances, cannot be compelled to attend and testify; but this subject must be relegated to the legislature, and in the absence of legislative action, such authority does not exist.

The writ will be denied.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 4637. Decided November 28, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. TOMMY SANTIAGO HOWARD, *Appellant*.¹

COURTS—STATE OR FEDERAL—OBJECTION TO JURISDICTION—WHEN MAY BE RAISED. An objection going to the jurisdiction of the state court to try a cause for the reason that the federal courts have exclusive jurisdiction of the offense and of the person of the accused may be raised for the first time in the supreme court.

HOMICIDE—INDIANS—OFFENSE COMMITTED ON RESERVATION—JURISDICTION OF STATE COURT—TRIBAL RELATIONS—WHEN NOT SHOWN—SEVERING RELATIONS—PROOF OF WHEN NOT NECESSARY. Where an Indian accused of murder committed upon a reservation testified that he was not a member of the tribe and had never had any tribal relations therewith, and was never allied by association with his ancestral tribes, and that he lived and worked among white people, no tribal relations are shown, and he cannot claim that the federal courts have exclusive jurisdiction of the offense on account of the failure of the prosecution to prove that he had severed his tribal relations.

SAME—JURISDICTION OF FEDERAL COURTS LIMITED TO INDIANS SUSTAINING TRIBAL RELATIONS. A state court has jurisdiction of an offense committed within the limits of a reservation against an Indian, by another who had never sustained any tribal relations, since Act. Cong. 1885, c. 341, § 9, 23 Stat. 385, providing that a crime by an Indian against another within the limits of a reservation shall be tried by the federal courts, must be limited to

¹Reported in 74 Pac. 382.

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Citations of Counsel.

Indians sustaining tribal relations, when construed in connection with all the other sections of the act, which all relate only to such Indians.

HOMICIDE—DEGREES OF OFFENSE—PERPETRATION OF RAPE—INSTRUCTIONS PROPER AS TO LESSER DEGREE ALTHOUGH EVIDENCE TENDED TO SHOW FIRST DEGREE ONLY. Under Bal. Code, § 7035, defining murder in the first degree as killing another with deliberate and premeditated malice, or in the perpetration of rape, etc., when an information charges the crime by strangling, it is not error to instruct as to lesser degrees and manslaughter in accordance with Bal. Code, § 6955, although the evidence tended strongly to show that the crime was committed while accused was perpetrating the crime of rape upon deceased (murder in first degree); since the crime defined by said § 7035, is a single one, however accomplished, and construed in connection with § 6955, authorizes a verdict for any degree inferior thereto.

SAME—INSTRUCTIONS—NECESSITY OF INQUEST—CORONER'S REASONS FOR NOT HOLDING. In a prosecution for murder, where the cross-examination of the coroner, who had declined to hold an inquest, was such as to leave the impression upon the minds of the jury that the inquest was necessary as a prerequisite to a prosecution, an instruction that no duty devolved upon him to hold an inquest when the cause of death was known to him, was not prejudicial as showing that the coroner was satisfied that the death was caused by the accused as charged.

CRIMINAL LAW—PRESENCE OF DEFENDANT IN COURT—RECORD WHEN SUFFICIENT. The failure of the record to show that the accused was present at the trial on a day named, cannot be urged as error, where the certificate discloses that the statement does not contain all the material facts, and the same is not certified to contain all the material facts that did occur, nor where a supplemental record shows that he was present on the day in question.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered October 7, 1902, after a trial and conviction of the crime of manslaughter; also, from orders over ruling motions for a new trial and in arrest of judgment. Affirmed.

F. R. Baker and *Leo & Cass*, for appellant. The killing in the perpetration of a rape is *ipso facto* and

necessarily murder in the first degree. *Washington v. State*, 25 Tex. App. 387, 80 S. W. 642. It is error to instruct as to manslaughter where the crime must have been murder in the first degree. *State v. Kilgore*, 70 Mo. 546; *State v. Stoeckle*, 71 Mo. 559; *State v. Mahly*, 68 Mo. 315; *People v. Sanchez*, 24 Cal. 17; *State v. Sexton*, 147 Mo. 89, 48 S. W. 452; *Crawford v. State*, 12 Ga. 480; *State v. Edwards*, 70 Mo. 480; *State v. Erb*, 74 Mo. 199; *State v. Cross*, 72 Conn. 722, 46 Atl. 148; *People v. Long*, 39 Cal. 694; *State v. Pike*, 49 N. H. 403; *State v. Wells*, 61 Iowa 629, 17 N. W. 90, 47 Am. Rep. 822; *State v. Alexander*, 66 Mo. 148. The federal court has exclusive jurisdiction; the allotments of the Indian lands in the reservation does not affect the reservation or the rights of the Indians. *State v. Columbia George*, 39 Ore. 127, 65 Pac. 604; *United States v. Flournoy Live-Stock etc. Co.*, 69 Fed. 886; *United States v. Mullin*, 71 Fed. 682; *United States v. Logan*, 105 Fed. 240; *Pilgrim v. Beck*, 69 Fed. 895; *Smythe v. Henry*, 41 Fed. 705; *Eells v. Ross*, 64 Fed. 417; *State v. Denoyer*, 6 N. D. 586, 72 N. W. 1014.

Fremont Campbell, *Charles O. Bates* and *Walter M. Harvey*, for respondent. The state court has jurisdiction when the Indian sustains no tribal relations. *People v. Ketchum*, 73 Cal. 635, 15 Pac. 353; *People v. Turner*, 85 Cal. 432, 24 Pac. 857; *Hunt v. State*, 4 Kan. 51; *United States v. Bailey*, 1 McLean 234; *United States v. John Ward*, 1 Kan. 601.

HADLEY, J.—Appellant was charged with the crime of murder in the first degree. The jury found him guilty of manslaughter, and the court sentenced him to serve a term of twenty years' imprisonment in the penitentiary. He has appealed from the judgment.

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It is first necessary that we shall inquire into the question of jurisdiction. One of the errors assigned is that the trial court had no jurisdiction to try the cause or to pronounce sentence therein, for the following reasons, towit: That the appellant is an Indian and the deceased was an Indian woman; that the alleged crime was committed within the limits of an Indian reservation and within the boundaries of the state of Washington; that there is no proof that the appellant had severed his tribal relations; and that the federal courts have, therefore, exclusive jurisdiction of the case. This question does not appear to have been raised in the court below, and is urged in this court for the first time. The question presented does not arise out of mere irregularities in procedure, but goes directly to the fundamental power of the court to assume jurisdiction of the cause in any event. Such being the case, we think the appellant can urge the point for the first time in this court.

The information charging the crime discloses none of the facts upon which appellant's claim of want of jurisdiction is based. It is an ordinary information, charging that the crime was committed in Pierce county, Washington. It does not disclose that either appellant or the deceased was an Indian, or that the crime was committed within the boundaries of an Indian reservation. The evidence, however, does show that they were Indians, and while it does not appear that any special effort was made to show that the crime was committed within the limits of an Indian reservation, yet it seems reasonably clear from the evidence that it was committed within the boundaries of the Puyallup Indian reservation.

It will be remembered that one of the points urged under this assignment of error is that the proof does not show that appellant had severed his tribal relations. Appellant

testified, that he does not belong to the tribe of Puyallup Indians; that his father did not belong to that tribe, but was a Victorian, and that his mother belonged to the Nesquallies; that for some time prior to 1893 he resided in the state of Oregon, and since the last named date his home has been, and now is, at Traceton, Kitsap county, Washington, where he lives with his mother, sister, and brother-in-law; that just prior to the time of the alleged crime he was working for Gentry Bros.' show. It thus appears from his own testimony that he is not by birth a member of the Puyallup tribe of Indians, and it is not shown that he has in any other manner ever become allied with that tribe. He says he attended the Indian school, and while it is not so specified, yet presumably it was the Puyallup Indian school; but he does not state that he ever even lived within the limits of the Puyallup reservation. We think it follows from his own testimony that appellant has never borne any tribal relation with the Puyallup Indians and, as far as the evidence discloses, he has never been in any way allied by association with his ancestral tribes. For at least a number of years, he has lived with members of his own family among white people, and away from any Indian tribe or reservation. We therefore believe that his contention upon this point cannot prevail by reason of any sustained tribal relation.

Our next inquiry must be whether the mere fact that appellant belongs to the Indian race, together with the further fact that the alleged crime was committed within the boundaries of an Indian reservation, lodges jurisdiction in the courts of the United States, and prevents the state courts from trying appellant for the crime charged. Appellant claims the privilege to be tried by the courts of the United States under the following federal statute:

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"That immediately upon and after the date of the passage of this act all Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians, committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States." Act. Cong. March 3, 1885, c. 341, § 9, 23 Stat. 385.

It will be observed that under the above statute, when one of the crimes enumerated therein has been committed within a territory of the United States, and whether within or without the boundaries of an Indian reservation, the offender shall be tried by the territorial court; but if the crime is committed within the boundaries of any state, and within the limits of an Indian reservation, the case shall be tried by the federal courts. It will be further observed that the general term "Indians" is used in the statute, and there are no qualifying words to indicate whether the statute relates alone to Indians sustaining tribal relations, or whether it relates to all Indians.

Appellant contends that the statute broadly and unqualifiedly includes all Indians. It must be conceded that the

contention seems forceful when the section quoted is read and considered alone without reference to the general subject-matter of the act of which it is a part. An examination of the act shows that its purpose was to make certain appropriations for the benefit of the Indian department, and to fulfill treaty stipulations with various Indian tribes. After making appropriations for the department, the act proceeds to authorize the fulfillment of treaty stipulations with more than fifty distinct and designated tribes and bands of Indians. Provision is then made for the investigation of Indian depredation claims, for schools, and for other miscellaneous matters connected with the Indian service. The last section of the act is the one quoted above. The other sections clearly relate to Indians sustaining tribal relations, and to the machinery of the government for dealing with such. It therefore seems reasonable that the quoted section, being the concluding one of the act, was intended to refer to such Indians only as were under consideration in other portions of the act, viz., tribal Indians.

This view is strengthened by the language of the opinion in *United States v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228. Appellant relies largely upon that case. One of the questions certified to be answered in the case was whether the provisions of the section quoted above are constitutional, and the court held that they are valid and constitutional. The other question certified, which was considered by the court, was the following: "Whether the courts of the United States have jurisdiction or authority to try and punish an Indian belonging to an Indian tribe for committing the crime of murder upon another Indian belonging to the same Indian tribe, both sustaining the usual tribal relations; said crime having been committed upon an Indian reservation made and set

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apart for the use of the Indian tribe to which said Indians both belong?" It will thus be seen that the question squarely presented the case of Indians sustaining tribal relations, and of a crime by such an Indian upon the person of another, and within the limits of a reservation. The opinion of the court, at page 383, contains the following:

"It will be seen at once that the nature of the offence [murder] is one which in almost all cases of its commission is punishable by the laws of the states, and within the jurisdiction of their courts. The distinction is claimed to be that the offence under the statute is committed by an Indian, that it is committed on a reservation set apart within the state for residence of the tribe of Indians by the United States, and the fair inference is that the offending Indian shall belong to that or some other tribe. It does not interfere with the process of the state courts within the reservation, nor with the operation of state laws upon white people found there. Its effect is confined to the acts of an Indian of some tribe, of a criminal character, committed within the limits of the reservation."

From the foregoing it seems clear that the court interpreted the section here under consideration to refer only to Indians belonging to, and sustaining relations to, some tribe, and such were held to be entitled to trial by the courts of the United States, when the crime is committed within the limits of a reservation, although within the boundaries of a state.

Appellant also relies upon the case of *State v. Columbia George*, 39 Ore. 127, 65 Pac. 604. The opinion in that case is an able and exhaustive discussion and review of the law upon the subject before the court. It was contended that the provisions of the section above quoted were repealed by the act of Congress of February 8, 1887, com-

monly called the "Dawes Act" (chapter 119, 24 Stat. 888), which allotted public lands to Indians, and declared that the allottees to whom such lands shall be patented shall be subject to the laws of the state of their residence, and shall be citizens of the United States. The court held that the later act did not repeal the said provisions of the former, and that the state courts did not have jurisdiction to try the case then under consideration. Both the accused and deceased were members of the Umatilla tribe of Indians, and both were allottees of reservation lands upon which they resided at the time of the commission of the crime. The case therefore came squarely within the rule announced in *United States v. Kagama*, *supra*. The reasoning of the opinion, we think, shows clearly that the Oregon court understood the federal provision on the subject of jurisdiction here under consideration to relate to tribal Indians, and that it does not apply to such as are not identified with any tribe.

We are not referred to any other case containing all the elements of the one now before us. Here an Indian having no tribal relation went within the limits of a reservation, and, it is alleged, killed another Indian. We have not seen any reported case where an Indian without tribal relations has been tried for a crime committed within a reservation. In the case of *People v. Ketchum*, 73 Cal. 635, 15 Pac. 353, it was held that the state court had jurisdiction to try an Indian without tribal relations, but it does not clearly appear from the opinion whether the crime was committed within or without the limits of a reservation. In *People v. Turner*, 85 Cal. 435, 24 Pac. 857, both the accused and the deceased were Indians, but it does not appear whether the crime was committed within or without a reservation, or what relation, if any, either sus-

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tained to any tribe. It was held that the court had jurisdiction.

Respondent cites *State v. Williams*, 13 Wash. 335, 43 Pac. 15, as being decisive of this case. It is true what is said in that opinion would of itself seem to be decisive of this case, but appellant calls attention to the fact that the crime there under consideration was not committed within a reservation. The following language of the opinion, invoked by respondent here, was therefore not directly applicable to the case then decided, to wit:

"Our investigation of the authorities leads us to conclude, first, that an Indian who has severed his tribal relations may be prosecuted in the courts of this state, without regard to whether the place of the commission of the offense is within or without the limits of a reservation.
. . ."

While the above language may not have applied to the facts of the case then under discussion, yet, based upon our discussion herein, and upon authorities cited in that opinion, we do not believe it was an erroneous statement of the law. We do not believe it was the intention of Congress that an Indian without tribal relations, who resides among the white people of a state, and is amenable to the laws thereof, can go within an Indian reservation in that state and commit a crime against another Indian, and then assert that the courts of his state cannot try him for the crime. It has been often held that the state courts can try white men for crimes committed within a reservation, and we can see no reason, in principle, why the jurisdiction of the state shall not likewise extend to an Indian who is not allied with any tribe, and is therefore not a subject of guardianship by the United States. We hold that, under the facts as they appear in the record, the trial court had jurisdiction to try the appellant.

It is assigned as error that the court gave the following instruction:

"Embraced within this charge is also that of murder in the second degree and manslaughter, and you may find the defendant guilty of either murder in the first degree, or murder in the second degree, or manslaughter, or not guilty."

It is contended that the evidence shows that the deceased was killed while her assailant was perpetrating a rape upon her person, and further that such an offense is made a distinct crime under the statute, as murder in the first degree, and does not include the lesser crimes of murder in the second degree and manslaughter. While the instruction criticized may be said to have been favorable to appellant, and while under its authority the jury found him guilty of the lesser crime of manslaughter, yet he urges that it is his right to have a verdict of guilty of murder in the first degree or acquittal.

The information does not charge the statutory crime of killing while in the perpetration of, or while attempting to perpetrate, a rape. It charges murder in the first degree, by choking, suffocating, and strangling the deceased. It is true, there was some evidence to the effect that the accused may have desired to ravish the deceased, and further that he may have actually done so. The testimony is not conclusive upon that point, although it strongly tends to support the theory of an actual ravishment. But whatever the evidence may establish upon that subject, a similar question was involved in *State v. Greer*, 11 Wash. 244, 39 Pac. 874. The defendant was charged with the crime of murder in the first degree by the administration of poison. He was found guilty of murder in the second degree. It will be observed that the charge was brought under the

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same section of the statute which appellant here invokes, viz., § 7035, Bal. Code, and the same contention was made in that case as is made here. The court held against the contention, and observed as follows:

"The language of the statute is that every person who shall kill another under certain circumstances shall be guilty of murder in the first degree, and there is no distinction as to the crime growing out of the means employed for its commission. We are therefore of the opinion that the crime set out in the statute is a single one and that, by whatever means it may have been committed, it includes the crime of murder in the second degree and manslaughter, as thereafter defined in the statute. The sections defining these crimes, when construed with § 1319 of the Code of Procedure, which provides that 'upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto,' authorized the verdict rendered in the case at bar."

Appellant urges here that *State v. Greer, supra*, has been overruled by *State v. Robinson*, 12 Wash. 349, 41 Pac. 51, 902. We do not so understand the latter case. It was simply held that the character of the offense of manslaughter is such as to exclude the possibility of an accessory before the fact, as an element in its composition. It appeared that the defendant was not present at the time of the killing. He was convicted of manslaughter. The court held that the legal effect of the verdict was to acquit the defendant of the higher degree of homicide, and that the evidence was insufficient to justify a conviction of manslaughter, and he was therefore discharged. The case of *State v. Greer* was particularly distinguished as being unlike the one then before the court. This distinction, we think, was correct. We shall therefore adhere to the rule

of *State v. Greer*, and under that rule the court did not err in giving the criticized instruction in this case.

It is assigned that the court erred in giving the following instruction:

"You are instructed, gentlemen of the jury, that, under the laws of the State of Washington, it is the duty of the county coroner to hold an inquest only when there shall exist reasonable grounds for the belief that the death of the person has been caused by unlawful means at the hands of another, and the cause of the death of such person is unknown. If the cause of the death of such person is known to the coroner, no duty would devolve upon him to hold such inquest. The defendant accused of the crime of killing a person has no right, under the law, to demand the holding of such an inquest."

It is urged that the instruction may have had the effect to cause the jury to believe that the coroner was not obliged to hold an inquest, because he was satisfied that the death of the deceased was brought about by appellant as charged. The instruction practically states the law as found in § 526, Bal. Code. We apprehend from the record that the court gave the instruction in view of the fact that the cross-examination of the coroner might, by inference, have left the impression upon the minds of the jury that an inquest was necessary as a preliminary to the prosecution of the accused. In that connection he testified that he was advised by the prosecuting attorney not to hold an inquest, and gave that as his reason for not doing so. In view of the character of the cross-examination of the coroner, we believe the instruction was pertinent, as stating the law upon the subject, and that it was not prejudicial in the sense suggested by appellant. The jury must have clearly understood from other instructions given that they must convict, if at all, upon the evidence before them at the

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trial, and not upon what the coroner may have theretofore believed. Moreover, they had before them at the trial the testimony of the coroner, which showed what he knew upon the subject at the time he, in his discretion, declined to hold an inquest; and that evidence, under the instructions, they were to weigh with all other testimony.

It is assigned as error that the record does not show that appellant was in court during the trial on September 25, 1902. The certificate attached to the statement of facts discloses that the statement does not contain all matters and proceedings occurring at the trial, and furthermore it is not certified that the statement contains all material matters which did occur. It will therefore, be presumed from the record that appellant was present in court at all stages of the trial. In any event, however, a supplemental record brought here by the respondent shows that appellant was present in person and by counsel on the day named.

It is assigned that the court erred in overruling the motion for a new trial, and under this assignment it is urged that the evidence does not support the verdict. We think the testimony amply supports the verdict, and since we find no reversible error, the judgment is affirmed.

FULLERTON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

[No. 4823. Decided November 30, 1903.]

LUCY H. A. BROWN, *Appellant*, v. EDWARD F. GILLETT,
Respondent.¹

APPEAL—REVIEW—OBJECTIONS TO TESTIMONY. Error cannot be predicated upon the admission of testimony when no sufficient objection was made thereto below.

SAME—REQUESTED INSTRUCTIONS. Error cannot be predicated upon the refusal to give requested instructions, where they are not contained in the record.

EVIDENCE—IMPEACHING—LAYING FOUNDATION. Where upon an issue as to fraudulent representations as to the value of a mining claim, a witness testified that it was not such as was represented, evidence of his previous statement that it was a good claim is impeaching testimony, and error requiring a reversal, where no foundation therefor had been laid by calling his attention thereto.

SAME—RULE APPLIES TO DEPOSITIONS. The rule that a witness may not be impeached by previous contradictory statements, unless the foundation therefore has been laid, applies to a witness whose testimony is taken by deposition.

APPEAL—ADMISSION OF IMPEACHING TESTIMONY—PREJUDICIAL ERROR. Error in the introduction of impeaching testimony without proper foundation, upon the point directly in issue, is presumed prejudicial since it cannot affirmatively appear what would otherwise have been the verdict.

RESCISSION—NECESSITY OF TENDER—WAIVER BY FAILING TO DEMUR. In an action in the nature of rescission of a contract to recover money paid on fraudulent representations, the objection that the plaintiff had not offered to surrender a mortgage given under the contract should be taken by demurrer to the complaint, and is too late after trial and verdict on the merits.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 14, 1903, upon the verdict of a jury rendered in favor of the defendant, in an action in the nature of rescission to recover money paid on representations respecting a mining claim. Reversed.

¹Reported in 74 Pac. 386.

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Byers & Byers, for appellant. It was error to allow witness Glines to be impeached without laying the foundation therefor. *Van Ness v. Bush*, 22 How. Prac. 481; *Muller v. I X L Lime Co.* (Cal.) 42 Pac. 1068; *Fitch v. Kennard*, 19 N. Y. Supp. 468; *State v. Hunsaker*, 16 Ore. 497, 19 Pac. 605; *Ryan v. People*, 21 Colo. 119, 40 Pac. 775; *Robinson v. Savage* (Ill.), 15 N. E. 850; *Kreuger v. Sylvester*, 100 Iowa 647, 69 N. W. 1059; *Connell v. McNett*, 109 Mich. 329, 67 N. W. 344; *Wylar v. Rothschild*, 53 Neb. 566, 74 N. W. 41; *McCulloch v. Dobson* (N. Y.), 30 N. E. 641; *Stone v. Northwestern Sleigh Co.*, 70 Wis. 585, 36 N. W. 248; *Conrad v. Griffey*, 16 How. 38, 14 L. Ed. 835; *Allen v. Swerdfiger*, 14 Wash. 461, 44 Pac. 894.

Greene & Griffiths, for respondent. The rule that a foundation must be laid for impeaching testimony is not universal. *Tucker v. Welsh*, 17 Mass. 160, 9 Am. Dec. 137; *Hedge v. Clapp*, 22 Conn. 262, 58 Am. Dec. 424; *Ware v. Ware*, 8 Greenleaf (Me.) 42; *Mattox v. United States*, 156 U. S. 253, 15 Sup. Ct. 337 (minority opinion). The rule is relaxed as to depositions. *Downer v. Dana*, 19 Vt. 338; *Fletcher v. Henley*, 13 La. An. 191; *Roberts v. Collins*, 6 Ired. 223; *Hooper v. Moore*, 3 Jones (N. C.) 428. The practice is under the control of the trial court. *Sloan v. New York C. R. Co.*, 45 N. Y. 125.

DUNBAR, J.—The complaint in this case alleges, in substance, that in April, 1901, the plaintiff obtained a loan from the defendant of \$500 on a fraudulent representation that a placer mining claim, which he had in Alaska, was abundant security for the said sum, and that the claim was a developed claim and was producing gold and would produce gold in large amounts; that said representations were

false and fraudulent, and were known by the defendant to be false and fraudulent when he made them; that plaintiff did not know at said time, and has only recently learned, that such representations were false and fraudulent, and that the mortgage security given by defendant to plaintiff was worthless and of no value whatever; and judgment is demanded for the sum of \$500, with interest at the legal rate from the date at which the money was obtained. The answer admits the obtaining of the \$500, but denies the allegations in relation to false and fraudulent representations, so that the question, at issue in the trial of the cause was whether or not false and fraudulent representations had been made by the defendant to the plaintiff. The cause was tried to a jury, and a verdict rendered in favor of defendant, from which judgment this appeal is taken.

The allegations are, (1) that the court erred in admitting evidence which showed, and tended to show, nothing more than that the claim mentioned had a speculative value; (2) that the court erred in admitting testimony as to the value of the claim of witnesses whose opinions were based on little or no knowledge, and in failing to instruct the jury as to the slight value of such testimony; (3) that the court erred in giving its instructions to the jury, in that the court wholly failed to instruct the jury that they could in any event find a verdict for the plaintiff; (4) that the court erred in refusing to give instructions requested by appellant to the effect that, if they believed from the evidence that the respondent made the representations alleged to have been made to the appellant, and that these representations were not true, their verdict should be for the appellant, and that it was not necessary for them to find that the respondent knew that the representations were

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false, and that, if they believed that any witness had wilfully testified falsely to any material fact, then they were at liberty to disregard the entire testimony of that witness; (5) that the court erred in permitting the respondent to impeach appellant's witness Glines, because the respondent had not on the examination of Glines laid any foundation for such impeachment.

It seems from the record that no sufficient objection was made to the introduction of the evidence complained of in the first and second assignments, if, indeed, it can be gathered from the brief what such evidence was. So far as the third assignment is concerned, the instructions of the court on the whole case seem to be unobjectionable. The fourth assignment—that the court erred in refusing to give instructions requested by the appellant to the effect mentioned above—is not presented by the record. After the instructions of the court and the objections by the appellant which we have mentioned, appears the following: “Mr. Byers: Plaintiff excepts to the refusal of the court to give the instructions requested by the plaintiff as requested.” But the record does not contain any requested instructions such as are set forth in appellant's brief under the fourth assignment. If any such instructions were asked by the appellant, he has failed to incorporate them in the record, and they are therefore not before this court for examination.

We think, however, that appellant's fifth contention—that the court erred in permitting respondent to impeach appellant's witness Glines without laying proper foundation for such impeachment—must be sustained. The witness Glines, in his deposition, had stated that the claim in dispute was not such a claim as had been represented by the respondent, and was valueless and worthless; and wit-

ness Lang, introduced by the respondent, was allowed to testify, over the objection of the appellant, that in a conversation he had with witness Glines, Glines had stated that the claim was a good claim. This was without doubt impeaching testimony, and was introduced for the purpose of impeaching the witness Glines. The rule is well established that, before a witness can be impeached by showing that he has made a statement different from the statement he makes in court, his attention must be called to the statement as nearly as possible by indicating to him the time and place and other circumstances tending to direct his attention to the testimony which is to be contradicted. The general rule is thus laid down by Wharton's Law of Evidence (3d ed.), § 555:

"When it is thus intended to discredit a witness by showing that he has on former occasions made statements inconsistent with those made on trial, it is usually requisite to ask him, on cross-examination, whether he has not made such prior contradictory statements, specifying in the question the persons to whom the alleged contradictory statements were made, and as far as possible the time and place. Only upon a denial, direct or qualified, by the witness, that such statements were so made, can proof of them be offered, as the object of the inquiry is to enable the witness to recall the incidents, and to explain in advance the inconsistency, if there be such."

In *Mutter v. I. X. L. Lime Co.* (Cal.), 42 Pac. 1068, it was held that where the defense in an action for cutting wood was that plaintiff agreed to pile it for measurement, but failed to do so, and defendant's foreman testified that the wood was not in condition to be measured, it was error to permit a witness called in rebuttal to testify that he had a conversation with said foreman after the suit had been commenced, and that said foreman told the witness that the said wood could be easily measured; as, if said testimony

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was intended to impeach said foreman's testimony, it was improper because no foundation had been laid. But it is unnecessary to accumulate authorities on this subject, for it seems to be the universal rule, both in England and America, for the reason, often stated, that it would be an injustice to the witness to admit testimony concerning alleged contradictory or inconsistent statements without calling his attention to the same, so that he might explain away the seeming inconsistencies.

It is contended, however, by the respondent that this rule does not apply in cases where the witness' testimony was taken in the form of depositions, and there are a few cases to that effect, though when examined they are generally found to be surrounded by circumstances which seem in the minds of the court to necessitate a modification of the rule. In one of the cases cited by respondent, viz., *Roberts v. Collins*, 6 Ired. (28 N. C.) 223, in a very short opinion, the rule is laid down, after the admission of the general rule which we have just discussed, that an exception to such rule was necessitated in that case because the declarations offered in evidence to contradict the witness were made after his first deposition was taken—a proposition which is not involved in this case, although we doubt the soundness of the argument of the court in that case that it could not be required of the defendant to take the deposition of the witness over again. A witness who gives his testimony by deposition ought to be protected in all respects as well as a witness who testifies orally, and while it may work a hardship to the opposing party to have a second deposition taken, yet that is his misfortune, and the inconvenience ought not to be offset against the recognized necessity for the rule in the first instance.

In *Downer v. Dana*, 19 Vt. 338, it was squarely held that the established rule that testimony as to the previous

declarations of a witness produced upon the stand, and offered for the purpose of impeaching him, could not be received unless an opportunity were first afforded the witness, whose testimony it was proposed to impeach, to explain or qualify the imputed declarations; yet this rule had no proper application to the testimony in the form of depositions. In the case of *Fletcher v. Henley*, 13 La. An. 191, cited by respondent, the impeaching testimony was admitted where no foundation had been laid by reason of the impossibility shown to lay the foundation, it having been shown that a commission to take the deposition was issued a second time with the interrogatories annexed, requesting the witness to state whether he had not made the statements to the persons named, who afterwards testified in open court, and it being found impossible to obtain the second deposition from the witness.

It is also contended by the respondent that this is a matter which is largely within the discretion of the court, and *Sloan v. New York Central R. Co.*, 45 N. Y. 125, is cited to sustain this contention; but an investigation of the case shows that it was simply the form of the questions which was involved, and that no discretion was vested in the court to do away altogether with the preliminary questions. After announcing the rule as stated by us above, in the course of its remarks the court said:

"To lay the foundation for contradiction, it is necessary to ask the witness specifically whether he has made such statements; and the usual and most accurate mode of examining the contradicting witness is to ask the precise question put to the principal witness. Otherwise, hearsay evidence, not strictly contradictory, might be introduced, to the injury of the parties, and in violation of legal rules. But the practice upon this subject must be, to some extent, under the control and discretion of the court. It is important that the jury should understand that such

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evidence is collateral, and not evidence in chief; and the witness sought thus to be impeached should have an opportunity of making explanation, in order that it may be seen whether there is a serious conflict, or only a misunderstanding or misapprehension; and for the purpose of eliciting the real truth, the court may vary the strict course of examination."

The overwhelming weight of authority, as well as the better reasoning, is opposed to the admission of impeaching testimony without notice. Rice on Evidence, p. 618, quotes the marginal note from *Kimball v. Davis*, 19 Wend. 437, as follows:

"The declaration of witnesses whose testimony has been taken under a commission, made subsequent to the taking of their testimony, contradicting or invalidating their testimony as contained in the depositions is inadmissible in evidence, if objected to. The only way for a party to avail himself of such declarations is to sue out a second commission. Such evidence is always inadmissible until the witness whose testimony is thus sought to be impeached has been examined upon the point, and his attention particularly directed to the circumstances of the transaction, so as to furnish him an opportunity for explanation or exculpation."

The author quotes also from Walworth, Ch., in the court of errors, (*Brown v. Kimball*, 25 Wend. 259) where the chancellor said:

"I concur with the supreme court in the opinion that it was improper to give the declarations of the witnesses in evidence, without giving them, in the first place, an opportunity to explain; and that the fact that the witnesses had been examined under a commission, did not prevent the operation of the principle upon which the rule is founded."

Excerpts to the same effect from 3 Starkie, Evidence, 1741; *Howell v. Reynolds*, 12 Ala. 128; and many other cases and authorities, are given to sustain the rule. Van

Ness v. Bush, 22 How. Prac. 481, lays down the same rule, and quotes approvingly the case of *Brown v. Kimball*, *supra*. In fact it seems to us that the overwhelming weight of authority makes no distinction between testimony that is taken orally and that which is taken by deposition, and that the court erred in admitting this impeaching testimony over the appellant's objection.

It is contended by respondent, however, that the tendency of the appellate court of this state is not to extend the application of the statute which forbids it to reverse a judgment for any errors which do not affect the substantial rights of the parties. But this court has repeatedly laid down the rule that an error will be presumed to be prejudicial unless it affirmatively appears from the whole case that it was error without prejudice, and we are not able to say that such was the fact in the case at bar. The question at issue, and which was solely a question for the determination of the jury, was the fraudulent representations made concerning the value of the mining claim, and the testimony impeached was testimony directly with reference to that question. What conclusion the jury would have come to in regard to the value of the claim if the witness had not been impeached, we are unable to determine.

It is also suggested by counsel for respondent that this case was in the nature of a rescission of a contract, and that it was the duty of the appellant, under the allegations of the complaint, to offer to deliver up the mortgage. But this is a question which would more properly have been raised by a demurrer to the complaint, when, if it had been held that such tender was necessary, the pleadings could have been amended, and a tender made; but after waiving any objections as to the sufficiency of the

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complaint, and going to trial on an answer putting in issue the merits of the complaint, we think it is too late for the respondent to raise that question here, even if the contention could be sustained.

The judgment will be reversed, and a new trial granted.

FULLERTON, C. J. and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4944. Decided November 30, 1903.]

MILLER G. SCOUTEN, *Appellant*, v. CITY OF WHATCOM
*et al., Respondents.*¹

STATUTES—CONSTRUCTION—AMENDMENTS—LEGISLATIVE INTENT—AMBIGUITY—WHEN SHOWN. Where an amendatory act (Laws 1903, p. 279) for the consolidation of cities provides that the special election of officers for the new city shall be held "six months after" the filing of the abstract of the vote for consolidation, and that it be called immediately, requiring a six months' notice, and the former act provided that it shall be held "within six months;" and another section of both the old and new acts provides that a special elections shall be held in accordance with the general election law, requiring a fifteen days' notice, such an ambiguity exists that an examination into the legislative intent is necessary, especially since the requirement that it be held six months after the date of filing may bring the election on Sunday, and since it is usual to allow latitude to avoid confusion. (Fullerton, C. J., and Mount, J., dissent.)

SAME—ENROLLED BILL—WHEN NOT CONCLUSIVE. Where a doubt exists as to the legislative intent in the wording of an ambiguous statute, reference may be made to the history of the bill before the legislature, beyond the enrolled bill, to ascertain the intent.

SAME—MUNICIPAL ELECTIONS—TIME OF HOLDING. Where the original bill (Laws 1903, p. 279) as introduced provided that an election should be held "within six months" after a certain date, and such clause remained in the bill through all its stages up to and including its final passage, when in the enrolled bill for the first time it appears as "six months after" said date, such change

¹Reported in 74 Pac. 389.

is manifestly a clerical error of the enrolling clerk, and in connection with an inconsistent section requiring a fifteen days' notice, the enrolled bill requiring six months' notice does not express the legislative intent, and must be construed to permit the election "within" six months upon fifteen days' notice, especially as the act was only amendatory upon a distinct point, no other change being made. (Fullerton, C. J., and Mount, J., dissent.)

Appeal by plaintiff from a judgment of the superior court for Whatcom county, Neterer, J., entered November 14, 1903, dismissing an action brought by a tax payer to restrain the first election of officers for the consolidated city of Whatcom and Fairhaven, upon overruling a demurrer to the defendants' affirmative defense. Affirmed.

A. E. Mead, for appellant.

H. M. White and *Brown & Rose*, for respondents. The enrolled bill is conclusive only as to the regularity of its passage. *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340. When a question arises as to the precise terms of a statute, resort may be made to any source of information which shows the intent. *Gardner v. The Collector*, 6 Wall. 499; *South Ottawa v. Perkins*, 4 Otto 260, 24 L. Ed. 154; *In re Duncan*, 139 U. S. 449, 11 Sup. Ct. 573; *Jones v. United States*, 137 U. S. 202, 11 Sup. Ct. 80; *Lyons v. Woods*, 153 U. S. 649, 14 Sup. Ct. 959. Clerical errors may be corrected and read as though the intended words were inserted. *Howlett v. Cheetham*, 17 Wash. 626; *Ex parte Hedley*, 31 Cal. 109; *State v. Stillman*, 81 Wis. 124, 51 N. W. 260; *Milwaukee County v. Isenring*, 109 Wis. 9, 85 N. W. 131. It is competent to resort to circumstances surrounding the passage of the bill, journals, proceedings and the history of the act. *Church of Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511; *Smith v. People*, 47 N. Y. 330; *Blake v. National Banks*, 23 Wall. 307, and cases above cited.

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HADLEY, J.—The cities of Whatcom and Fairhaven are contiguous municipalities of the third class. The legislature of 1890 provided for the consolidation of contiguous cities, the method thereof being set forth in § 10, at page 138, Session Laws 1890. On the 27th day of October, 1903, in pursuance of the terms of said statute, the aforesaid cities, by the necessary vote of the electors of each municipality, declared in favor of their consolidation under the name of the city of Bellingham. On the 2d day of November, 1903, said vote was duly canvassed as provided by law, an abstract thereof was recorded in the minutes of the proceedings of the city council of each city, and a certified copy of such abstract was transmitted to the secretary of state, and by him filed in his office. It is provided in the statute above cited that immediately after such filing the legislative body of that one of such corporations having the greater population, as shown by the last state census, shall call a special election for the election of officers required by law to be elected in corporations of the class to which such new corporation shall belong.

It is conceded that the combined population of the two cities, as shown by the last census, placed the new and consolidated city in the rank of second class cities, as classified under the laws of this state. The city of Whatcom contained the greater population of the two, and, after the filing of said certified abstract of the vote with the secretary of state, the city council of that city, on the 9th day of November, 1903, by resolution, called such special election for the election of the officers provided by law for cities of the second class; said election to be held on the 22d day of December, 1903.

Thereafter the appellant, a resident taxpayer, instituted this action and sought an injunction against respondents

to prevent the allowance and payment of any claim for expenses growing out of the holding or attempted holding of said special election, on the ground that the date fixed therefor is premature and that the action of the council in fixing such date was void. The theory upon which the action is waged is based upon the statute above cited, as it is claimed by appellant to have been amended by the legislature of 1903. See Chap. 145, p. 279 *et seq.*, Session Laws 1903.

An examination of the statute of 1890 shows that the only method provided for consolidating contiguous cities of all classes was by an election to be held in each of the cities sought to be consolidated. The statute, as amended in 1903, contains a proviso to the effect that cities of the third and fourth classes may be annexed to cities of the first class without the necessity of an election in such cities of the first class. When a vote in a city of the third or fourth class is in favor of annexation, the city council of such city shall file a petition, together with an abstract of the vote so taken and canvassed, with the city council of such city of the first class, which latter council may thereafter by ordinance complete the work of annexation. The probable purpose of this proviso was to save the expense of holding special elections upon this subject in cities of the first class. This provision does not affect the controversy here, except as it may be incidentally involved in the discussion hereinafter. We refer to it here in order to show that said proviso contains the only change that was made in the law of 1890, unless it was also changed in the particular urged by appellant, and upon which he bases this suit.

The law of 1890 provided as follows:

"Immediately after such filing the legislative body of that one of such corporations having the greatest popu-

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lation, as shown by the last state census, shall call a special election, to be held in such new corporation, for the election of the officers required by law to be elected in corporations of the class to which such new corporation shall belong; which election shall be held within six months thereafter."

The amended law of 1903, as found in the published session laws, is in all respects like that of 1890, with the exception of the proviso above mentioned, and with the further exception that the word "within" is omitted from the last clause of the portion quoted above, making it read, "which election shall be held six months thereafter." Appellant therefore contends that under the statute as amended the special election for the election of officers must be held six months from the date the certified abstract of the vote was filed with the secretary of state, and that the date fixed by the city council of Whatcom as aforesaid is therefore premature and unauthorized in law.

The respondents answered the complaint and recited the history of the amending bill in the legislature of 1903. It appears by the averments, that the original bill as introduced contained the word "within" in the clause above quoted; that the word was never omitted by any motion to amend or otherwise; that the bill as passed by both branches of the legislature contained the said word; that the bill as intended to be signed by the president of the senate, speaker of the house, and the governor, contained the word, but that the enrolling clerk of the senate, by error, inadvertence, or oversight, omitted it when enrolling the bill. It is alleged that as the bill was actually passed by the legislature the statute of 1890, in this particular, was unchanged, and that the law still authorizes the holding of such special election at any time within six months

from the date of filing the certified abstract of the vote with the secretary of state.

The appellant demurred to the affirmative answer of respondents on the ground that it is insufficient in law to constitute a defense. The court overruled the demurrer, and the appellant having declined to further plead, judgment was entered in favor of respondents, and the cause was dismissed at appellant's costs. He has appealed from the judgment. By stipulation, and because of immediate public necessity, the cause was advanced for hearing in this court.

It is urged by respondents that the statute as published in the Session Laws of 1903 is involved in such ambiguity that an interpretation is necessary in order to determine the legislative intent. It will be observed that the statute, both originally and as amended, requires that a special election shall be called *immediately* after the abstract of the vote on consolidation is filed with the secretary of state. It is also provided in each instance that "such election shall be called and conducted in all respects in the manner prescribed, or that may hereafter be prescribed by law, for municipal elections in corporations of such class." § 844, Bal. Code, provides that elections in cities of the second class shall be conducted according to the general election laws of the state. The general election laws provide that but fifteen days' notice of any special election is required. § 1335, Bal. Code. It follows that but fifteen days' notice is required here, if we refer to the general laws.

Appellant, however, contends that the statute now under consideration requires that the special election shall be called six months in advance of the time it shall be held. The calling of the election involves notice thereof.

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The fact must be brought to the knowledge of the public by notice, since there could be no manifest purpose in calling an election six months in advance without informing the public of it through the medium of notice. This would require the giving of notice for a period of six months, which is inconsistent with the other provision of the statute that refers to the general laws, and requires but fifteen days' notice. The statute of 1890 provides that the election may be held at any time within six months, and under that provision the city council may fix the date and give fifteen days' notice thereof.

There is another element involved if the statute shall be literally read as published. No definite date is fixed for filing the abstract of the vote with the secretary of state, and if the election is required to be held six months from the date the abstract may be filed, it will be seen that it is possible for the date of the election to fall upon a Sunday or legal holiday, thus making it impossible to hold an election at such a time under other provisions of law. It is, we believe, an anomaly in legislation for the date of an election to be irrevocably fixed by reference to an indefinite time depending upon circumstances. It is usual to fix a definite time or to leave such latitude to subordinate municipalities that the date may be fixed without resulting in confusion. Under the statute of 1890, the date can be fixed by the city council without conflicting with any Sunday or legal holiday. For the reasons above indicated, we believe such ambiguity exists in this statute as published that an examination into the legislative intent is necessary in order to interpret it.

In determining the legislative intent, appellant contends that the courts are not authorized to look into the history of the legislation, and that they cannot go beyond the

wording of the bill as enrolled. It is also contended that this court has so held in *State ex rel. Reed v. Jones*, 6 Wash. 452, 34 Pac. 201, 23 L. R. A. 340. In that case, however, the validity of the law itself was attacked on the ground that the constitutional requirements had not been pursued in the passage of the bill. It was held that when an enrolled bill is fair upon its face the courts will accept it as having been regularly enacted, and will not inquire as to whether the legislature has or has not followed constitutional requirements in its enactment. A different question is presented in the case at bar. The validity of the law under consideration is not attacked; it is merely a question of determining what the legislature intended by a valid law.

It becomes interesting, therefore, to determine to what extent the courts may examine into the history of legislation or resort to extrinsic circumstances when attempting to construe the legislative intent in a statute containing ambiguities, but at the same time a valid law. In *Howlett v. Cheetham*, 17 Wash. 626, 50 Pac. 522, this court had occasion to discuss a similar question. A regularly enacted statute, as enrolled and published, contained a repealing clause purporting to repeal former legislation. It was contended that the repealing clause was inconsistent with other portions of the act, and that such ambiguity existed as made it necessary to inquire into the legislative intent in order to construe the statute. The court observed, at page 630:

"The only object of construction is to ascertain the meaning and intention of the legislature, and when that intention is discovered it is controlling, although it may be contrary to the strict letter of the statute."

Authorities are there cited to the effect that, when a doubt exists as to the legislative intent, reference may be

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made to the circumstances under which, and the purposes for which, a statute is passed, in order to ascertain such intent. In referring to such circumstances and purposes, the court in that case, both in the main opinion and in the opinion concurring specially, considered the history of the bill as it was before the legislature. From such history, and from the circumstances surrounding the passage of the bill, it was concluded, that the words of repeal, although absolute in themselves, were qualified by the intention of the legislature, as manifested in other parts of the same act; that the repealing clause, having been inadvertently included, did not express the legislative intent; and that the real intent should control as against the strict words of the statute; and it was therefore held that the law actually passed without the repealing words.

In *Blake v. National Banks*, 23 Wall. 307, 23 L. Ed. 119, the Supreme Court of the United States construed an ambiguous statute passed by Congress. In order to ascertain the legislative intent, the court referred to the journal of the house of representatives. At page 319, the court observed:

"Under these circumstances, we are compelled to ascertain the legislative intention by a recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records, and by giving such construction to the statute as we believe will carry out the intentions of Congress. The intention of the house, upon the record we have quoted, is plain."

A similar course was pursued in *Church of the Holy Trinity v. United States*, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226. At page 465, the court observed:

"We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the com-

mittee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap, unskilled labor."

Respondents cite the case of *Gardner v. The Collector*, 6 Wall. 499, 18 L. Ed. 890, and in their brief they quote the following general observations from the opinion at page 511:

"We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

We think much of the quotation is pertinent to the question presented here, where legislative intent only is involved; but it includes a broader statement of a general rule than this court followed in *State ex rel. Reed v. Jones*, *supra*, and also a broader rule than the same court has since followed when the actual existence or validity of a statute was involved. In *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294, the validity or actual existence of a statute was attacked on the ground that the constitutional procedure had not been followed in the introduction and passage of the bill. It was held that the court would not look back of the enrolled bill, which had been authenticated by the signatures of the presiding officers of the two houses of Congress and by the approval of the president, and declare that such an act was not in fact passed and did not become a law. The point decided was essentially similar to that decided by this court in *State*

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ex rel. Reed v. Jones. When it came to the actual construction of the statute as passed, the court did not find it necessary to look beyond its own terms. The principal question raised was the validity of the statute.

In *United States v. Ballin*, 144 U. S. 1, 12 Sup. Ct. 507, 36 L. Ed. 321, a similar question was presented. The court observed as follows, at page 4:

"Assuming that, by reason of this latter clause, reference may be had to the journal, to see whether the yeas and nays were ordered, and, if so, what was the vote disclosed thereby, and assuming, though without deciding, that the facts which the Constitution requires to be placed on the journal may be appealed to on the question whether a law has been legally enacted, yet, if reference may be had to such journal, it must be assumed to speak the truth."

Reference was then made to the journal, and assuming that it spoke the truth, the court found that the bill had passed with sufficient regularity, but left the question undecided in that case whether the journal may be appealed to on the question whether a law has been legally enacted. As we have seen, that question is not involved here, and we therefore find nothing in the cases mentioned from the Supreme Court of the United States that conflicts with the contention of respondents here. In *Ex parte Hedley*, 31 Cal. 109, it was held that where there is an evident mistake in the use of a word in a statute, and it is apparent what word was intended, it will be read as though the intended word were inserted. To similar effect is *State v. Stillman*, 81 Wis. 124, 51 N. W. 260.

Sutherland on Statutory Construction, at § 300, discusses generally the subject of resorting to legislative history in order to determine legislative intent. Reference is there made to the decisions of different states where it has been held that resort may be had to the legislative jour-

nals for that purpose. In *Milwaukee County v. Isenring*, 109 Wis. 9, 85 N. W. 131, 53 L. R. A. 635, the court, after citing many cases to support the rule that courts, when seeking to determine the contents of a statute, "may look to the enrolled bill, to the engrossed bill, and to any other legitimate evidence within their reach," observed as follows: "What has been said clears the way for the court to examine the original bills in question in this case. . ."

Under the authorities above discussed, including *Hewlett v. Cheetham*, *supra*, by this court, resort may be had to the history of the statute in question in order to determine the legislative intent. As we have seen, that history shows that the original bill as introduced contained the word "within" in the clause hereinbefore quoted. It remained in the bill at all subsequent stages of its history up to and including the time of its actual passage by both branches of the legislature. Its absence is noted for the first time in the enrolled bill. Manifestly, therefore, its omission is due to the clerical oversight and inadvertence of the enrolling clerk, and not to the intention of the legislature. That the legislature intended to include the word is further emphasized by the fact that with the word included the statute becomes consistently operative in all its parts, while with its omission ambiguity, uncertainty, and confusion are the logical result, and may possibly lead to what in the briefs of counsel is appropriately termed "municipal chaos." Such a possibility, taken in connection with the bill as actually introduced and passed, impels the conclusion that the law as enrolled and published does not clearly express the legislative intent.

Under the authorities the following circumstances are also subjects of legitimate consideration in arriving at the intent of the legislature: As hereinbefore stated, the bill

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as introduced provided an amendment relating only to the annexation of third and fourth class cities to first class cities. No other change of the former law was proposed at that time, and no other was ever proposed in the history of the bill. It is therefore apparent that the intention in the minds of the members of the legislature was to amend the law in the one particular only.

For the foregoing reasons, we hold that the statute of 1890 was not amended in the particular urged by appellant. The superior court, therefore, did not err, and the judgment is affirmed.

DUNBAR and ANDERS, JJ., concur.

FULLERTON, C. J.—I dissent. It seems to me that the provision in question is not ambiguous, and is not out of harmony with the other provisions of the law, but is so plain as not to require construction.

MOUNT, J., concurs with FULLERTON, C. J.

[No. 4748. Decided December 1, 1903.]

TACOMA NATIONAL BANK, *Plaintiff*, CHRISTIAN ANDERSON, *Assignee, Appellant*, v. OTIS SPRAGUE, *Respondent*.¹

JUDGMENT—REVIVAL—PREMATURE ORDER—QUASHING EXECUTION. Under 2 Hill's Code, § 462, providing that a judgment may be revived upon motion at the end of five years, an order of revival before the five years have elapsed is void and execution issued thereon should be quashed.

SAME—LIEN—DURATION—STATUTES—REPEAL. Laws 1877, p. 66, § 326, providing that parties may continue the lien of a judgment before the expiration of the five-year period, was repealed by the code of 1881, which left out such provision in reenacting the law

¹Reported in 74 Pac. 393.

relating to the revival of judgments, since by § 3319 all prior laws relating to the same subject were expressly repealed.

SAME—PREMATURE REVIVAL—ACTION ON JUDGMENT. A premature proceeding to revive a judgment by motion cannot be sustained upon the ground that one may have a judgment upon a judgment before the expiration of five years, since that must be done by an independent suit.

Appeal by Christian Anderson, assignee of a judgment, from an order of the superior court for Pierce county, Chapman, J., entered May, 6, 1903, upon motion of defendant, quashing a writ of execution issued upon the judgment. Affirmed.

John A. Parker, John C. Stallcup, and J. W. A. Nichols,
for appellant.

E. R. York, for respondent.

MOUNT, J.—On June 24, 1894, the Tacoma National Bank obtained a judgment in the superior court of Pierce county against Otis Sprague, C. Van Horne, and R. W. Derrickson, jointly and severally, for \$4,730 and costs. In November, 1897, the judgment was sold and assigned by the receiver of the Tacoma National Bank to the appellant, Christian Anderson. On December 29, 1898, Christian Anderson filed a motion for a revival of the judgment, alleging the making and entry of the judgment, the assignment thereof, and the amount due thereon after deducting a credit of \$500 previously made upon execution. A summons as required by law was thereupon served upon the defendant Otis Sprague alone. No appearance by the defendants, or any of them, was made in response to this motion; and on January 19, 1899, an order was entered reviving the said judgment against Otis Sprague alone, for the amount then due, \$6,151.40. On April 18, 1903, Christian Anderson caused a writ of execution to issue

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upon the revived judgment, directing the sheriff of Pierce county to make the amount thereof out of the property of the defendant Otis Sprague. On April 30, 1903, Otis Sprague served, and filed in the superior court, a motion to quash the writ of execution upon several grounds, one of which was that the original judgment had become dormant, and had not been lawfully revived prior to the issuance of the writ of execution. The lower court sustained this motion, and entered an order quashing the writ, and suspended all further proceedings thereunder. From this order Christian Anderson appeals.

The principal question in the case is whether or not the revival proceedings were void by reason of the fact that the motion was made and the order of revival entered, within five years from the entry of the original judgment. The statute (§ 462, 2 Hill's Code) provides: "If any judgment remain unsatisfied in whole or in part at the end of five years after the date of its rendition, the lien thereof may be revived and continued as in this section provided;" and then follows a description of what the motion and notice shall contain, and the steps necessary to obtain the order of revival. All the provisions of the statute were strictly followed in this case, except that the motion was made and the order of revival entered before the expiration of the five-year period.

The respondent contends that the lower court was without jurisdiction to entertain the motion or to enter the order within the five-year period. The statute clearly provides that, if any judgment shall remain unsatisfied in whole or in part *at the end* of five years after the date of its rendition, the lien thereof may be revived or continued. It seems clear that the words "at the end" mean after the expiration of five years. Taken in connection with the

proviso in the next section (§ 463, 2 Hill's Code), as follows, "Provided, however, that no judgment shall be revived or continued unless proceedings for such revival or continuance shall be commenced within six years after the date of its rendition," it seems clear that the intention was that such proceedings must be taken at the end of five years, and within six years from the date of the rendition of the judgment sought to be revived. This court, in *Brier v. Traders' Nat. Bank*, 24 Wash. 695, 64 Pac. 831, in discussing these statutes, at page 709, said:

"The very term 'revive' means to restore or bring again to life. When revived it becomes again a new judgment, on which execution may issue as a personal liability, and it continues in existence for five years longer, from the date of the order of revival, and the lien thereof, like the judgment, an incident thereto, is a new creation, and dates from the order of revival, if a transcript is filed in twenty days; otherwise, the lien is suspended just as if it was an original judgment. The contention of the respondent that the proceedings to revive must be instituted 'at the end' of the five years, and not 'within' the year following, cannot be sustained. While § 462, *supra*, reads, if any judgment remains unsatisfied 'at the end of five years after the date of its rendition, the lien thereof may be revived,' etc., § 463, *supra*, says that 'no judgment shall be revived or continued unless proceedings for such revival or continuance shall be commenced within six years after the date of its rendition.' The law does not provide that revival proceedings shall be commenced 'at the end' of five years from the rendition of the judgment, but does provide that 'within a year'—that is, six years after the date of the rendition of the judgment—revival proceedings must be instituted. The judgment creditor is supposed to avail himself, within the five years, of the right to issue an execution, and exhaust thereunder the property of the judgment debtor upon which the judgment is a lien. The law then gives the judgment creditor, after the first five years, the

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further right to have a new judgment for any unpaid balance, which, from the date of its rendition, will also become a lien for an additional five years, provided proceedings to revive such judgment are instituted within the one year, as we have stated."

See, also, *Packwood v. Briggs*, 25 Wash. 535, 65 Pac. 846; *Sears v. Kilbourne*, 28 Wash. 194, 68 Pac. 450.

The method of revival of judgments or liens is a purely statutory creation, following very closely the proceedings at common law by writ of *scire facias* for renewing judgments; but it was clearly the intention of our statutes that the proceedings should not be commenced until the end of five years from the rendition of the judgment, at which time the judgment and lien become dormant. This being true, the court was without jurisdiction to enter the order of revival before the end of five years, and the order was therefore a nullity.

It is claimed by appellant that the act of 1877, p. 66, § 326, wherein, under the chapter "Lien of Judgments," is found this language, "And provided also that parties may continue said lien by proceedings had before the expiration of said period of five years," has never been repealed, and is still in force. This provision was left out of the Code of 1881. The legislature of that year re-enacted the chapter on revival and continuance of judgments in the form found in the Code of 1881, and at § 3319 provided that the prior laws relating to the same subject were expressly repealed. This, we think, was a repeal of that part of the act of 1877 above referred to.

It is also argued by appellant that it is the settled doctrine of this court that one may have a judgment upon a judgment at any time within five years. This is, no doubt, true where an independent suit is brought upon a judgment, as was held by this court in *Citizens' Nat. Bank*

v. Lucas, 26 Wash. 417, 67 Pac. 252. But this proceeding was not an independent action upon the judgment. It purports to be, and was, instituted as a proceeding to revive the judgment and lien in the same court in the original case, under the express terms of the statute. As we have seen above, it was prematurely brought for that purpose, and the court had no jurisdiction to make the order of revival.

The order appealed from is therefore affirmed.

ANDERS, DUNBAR, and HADLEY, JJ., concur.

33	290
33	600
33	601
33	390
30	224
30	225

[No. 4779. Decided December 2, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. THOMAS S. WOOD, *Appellant*.¹

APPEAL—RECORD—AFFIDAVITS—HOW BROUGHT UP. Affidavits and evidentiary matter will not be considered by the supreme court unless brought up by a bill of exceptions or statement of facts.

INCEST—EVIDENCE OF PRIOR OFFENSES. In a prosecution for incest it is competent to prove acts of sexual intercourse between the parties occurring prior to the offense charged.

Appeal from a judgment of the superior court for Douglas county, Martin, J., entered May 1, 1903, after a trial and conviction of the crime of incest. Affirmed.

Martin & Grant and *W. E. Southward* (*John E. Ryan*, of counsel), for appellant.

E. T. Trimble, and *R. S. Steiner*, for respondent.

FULLERTON, C. J.—The appellant was informed against by the prosecuting attorney of Douglas county for the crime of incest committed upon the person of his own

¹Reported in 74 Pac. 380.

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daughter. He was tried upon the charge, found guilty, and adjudged to serve a term of years in the state penitentiary. From the judgment and sentence he appeals.

Of the numerous errors assigned there are none that can be reviewed on the record made by the appellant. They all go to questions which must be brought to this court by a bill of exceptions or statement of facts over the certificate of the trial judge, and the appellant's record on appeal consists of a transcript of certain of the files and journal entries made in the course of the trial in the court below, brought here over the certificate of the clerk of the trial court. It is true that in this transcript there are a number of affidavits which suggest the questions argued at the bar and in the briefs, but we have said repeatedly, and here say again, that evidentiary matter cannot be brought into this court in this way. Affidavits, like all other evidence introduced at the trial of the cause, must be brought into this court by a bill of exceptions or a statement of facts; and this is the rule in criminal as well as in civil cases. *State v. Anderson*, 20 Wash. 193, 55 Pac. 39; *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487.

But while the record brought here by the appellant fails to present the question suggested by him, the prosecuting attorney, in a spirit of fairness that is commendable, has made available to him the only question among his assignments which he concedes a correct record would substantiate; namely, did the court err in permitting the prosecuting witness to testify to acts of sexual intercourse between herself and the defendant occurring prior to the act charged in the information? The general rule undoubtedly is that evidence of a distinct and different offense from that for which the defendant is on trial is inadmissible, but that rule has no application to cases of the char-

acter of the one before us. In prosecutions for adultery, fornication, rape upon one under the age of consent, and incest, it has been held uniformly that acts of sexual intercourse occurring between the parties prior to the act charged in the information may be proved. The reason for the rule is well stated in *State v. Markins*, 95 Ind. 464, 48 Am. Rep. 733, where it is said:

"It is a rule of elementary logic, as well as of rudimentary law, that evidence which tends to establish facts rendering it antecedently probable that a given event will occur, is of material relevancy and strong probative force. It is more probable that incestuous intercourse will take place between persons who have conducted themselves with indecent familiarity than between those whose behavior has been modest and decorous. It cannot be doubted that it is competent to show the previous intimacy between the persons charged with the crime of incest, their behavior toward each other and their acts of impropriety and indecency. If it be proper to show acts of indecent and lascivious character, then, surely, it must be proper to show the act to which all such indecent and lascivious acts leads and in which they will often culminate. It cannot be held, upon any principle of law or logic, that the state may show acts of improper intimacy up to the very act of sexual intercourse, and then must stop, although the sexual intercourse is but the usual result of the previous lascivious conduct. If the course of conduct tends to show that the incestuous intercourse charged in the indictment did take place, then, surely, the culminating act of sexual commerce must be evidence of a convincing character. It would be a singular rule that would admit evidence of lascivious conduct, and yet exclude the evidence of the act, which of all the series supplies the strongest evidence that the crime charged was one likely to be committed. If the rule were that the state might show previous lascivious conduct, but must not show an act of sexual intercourse, we should have the singular anomaly of a legal rule rejecting evidence simply because of its strength and importance. The usual

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rule of common sense, as of law, is that the more material the evidence and the stronger its probative force the greater the reason for holding it to be competent."

See also: *People v. Jenness*, 5 Mich. 305; *People v. Cease*, 80 Mich. 576, 45 N. W. 585; *People v. Skutt*, 96 Mich. 449, 56 N. W. 11; *State v. Pippin*, 88 N. C. 646; *State v. Bridgman*, 49 Vt. 202, 24 Am. Rep. 124; *Commonwealth v. Bell*, 166 Pa. St. 405, 31 Atl. 123; *Lefforge v. The State*, 129 Ind. 551, 29 N. E. 34; *People v. Paterson*, 102 Cal. 239, 36 Pac. 436.

The judgment is affirmed.

HADLEY, MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 4709. Decided December 2, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. H. EUBANK,
Appellant.¹

LARCENY—RANGE ANIMALS—EVIDENCE OF CHARACTER OF ANIMAL. Evidence that a horse had been running at large upon land but partially inclosed in an open country where animals come and go at will sufficiently shows the animal to be within the classification of range animals.

SAME—EVIDENCE—POSSESSION OF STOLEN PROPERTY. In a prosecution for larceny, recent possession is a circumstance to be considered by the jury along with other circumstances in evidence.

TRIAL—EVIDENCE—SUFFICIENCY. A motion for an acquittal should be overruled where there is any evidence tending to prove the crime charged.

LARCENY OF RANGE ANIMAL—RECENT POSSESSION—EVIDENCE OF—INSTRUCTIONS. Evidence that an animal was found in the possession of the defendant within a few months after it was permitted to run on the range, raises a question for the jury as to whether it was "shortly after," and warrants an instruction as to the usual presumption from "recent possession."

¹Reported in 74 Pac. 378.

SAME—COMMENT ON EVIDENCE. In a prosecution for larceny an instruction that "proof of the fact" of possession is sufficient to put upon defendant the burden of explaining such possession, is not objectionable as a comment on the evidence, especially when the succeeding portion adds, "if you find such fact from the evidence."

SAME—POSSESSION OF RANGE ANIMALS—PRESUMPTION—BURDEN OF PROOF. Bal. Code, § 7114, creates an exception to the general rule in ordinary larceny cases, and thereunder in the case of animals allowed to run on the range, proof of possession puts upon defendant the burden of explaining such possession.

TRIAL—INSTRUCTIONS—COMMENT ON EVIDENCE. Where a letter had been admitted in evidence to show the intent of the defendant in taking possession of an animal which he was charged with stealing, it is not error or unlawful comment on the testimony, in refusing to reopen the case for the purpose of proving the handwriting, for the judge to state that "it is no issue in this case" and to direct the jury to disregard the matter suggested in the offer.

LARCENY—PROOF OF OWNERSHIP—CROSS-EXAMINATION—INSTRUCTIONS. Where the prosecuting witness states on direct examination that the stolen horse was his, what he says on cross-examination is matter for argument to the jury, and cannot be made the basis for an instruction assuming that he could not swear positively to his ownership of the property.

LARCENY—DEFENSE OF TAKING UNDER CLAIM OF RIGHT—WHEN TO BE SUBMITTED. A defense that property claimed to have been stolen was taken under a claim of right must be submitted to the jury unless the proofs are so convincing as to practically preclude any reasonable possibility of criminal intent.

Appeal from a judgment of the superior court for Whitman county, Chadwick, J., entered July 19, 1902, after a trial and conviction of the crime of larceny. Affirmed.

M. O. Reed and H. W. Canfield, for appellant.

Robert M. Hanna, for respondent.

HADLEY, J.—Appellant was charged with stealing, taking, and driving away, one gray gelding of the value of \$60, the property of one Charles Johnson. The jury returned a verdict of guilty as charged. A motion for a

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new trial was denied and judgment was entered upon the verdict, by the terms of which appellant was sentenced to serve a term of five years in the state penitentiary. He has appealed from the judgment.

It is assigned as error that the court overruled a motion for nonsuit—in effect a motion for acquittal of appellant—at the close of respondent's case. It is urged in support of this assignment that the evidence had not shown the possession of the animal to have been recent, and that even recent possession, standing alone, is not sufficient to support a conviction for larceny. It is also asserted that the animal was not a range animal. The evidence for the state had shown, that the animal had been running at large upon land but partially inclosed, through the middle of which ran the county road; that the character of the country was the same as any other open country, and animals come and go at their will. We think there was sufficient evidence for the jury that the animal came within the classification of range animals. Perhaps appellant's assertion that recent possession of itself is not sufficient to warrant a conviction is true, but it is at least a circumstance to be considered by the jury along with other circumstances in evidence. Other circumstances had appeared in the evidence of the state, and the possession shown by the testimony was sufficiently recent for the jury to consider it with all other evidence. In *State v. Hyde*, 22 Wash. 551, 564, 61 Pac. 719, this court said of a similar motion:

“This motion is a general one, and only challenges the general sufficiency of the evidence; that is, say, in effect, there is a total failure of evidence. Upon a motion of this kind, the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence fails in some particular matters.”

To the same effect is *State v. Elswood*, 15 Wash. 453, 46 Pac. 727. We think the state had introduced evidence tending to prove the crime charged, and under the above rule the court did not err in denying the motion for non-suit or acquittal.

Error is urged upon the following instruction given by the court:

"If you find from the evidence that Charles Johnson was the owner of the gelding described in the information, and that said gelding was permitted to run on the range, proof of the further fact that said gelding was shortly thereafter in the possession of the defendant is sufficient to put upon defendant the burden of explaining such possession. The presumption, if any, arising from such fact of possession of range stock, if you find such fact from the evidence, is one of fact only and is rebuttable, and such presumption is overcome whenever a reasonable explanation is made or arises from the evidence; that is, an explanation which you deem reasonable, considering all the facts and circumstances of the case, is given, and is not shown to be untrue."

It is first asserted that there was no evidence that the gelding was found in the possession of appellant shortly after the animal was permitted to run on the range. There certainly was evidence to the effect that appellant was in possession after the gelding was permitted to run on the range. Whether that possession was shortly afterwards was for the jury to determine. The term used by the court is indefinite as to time, and signifies practically the same idea as the common expression "recent possession." The testimony was to the effect that the possession was at least within a few months after the animal was permitted to run upon the range, and we see no prejudicial error in the instruction on the ground urged as above stated.

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It is further asserted as against this instruction that it states as a fact that the gelding was shortly thereafter in the possession of the defendant, and that such statement was an unlawful comment upon the evidence. We do not think the instruction is susceptible of such interpretation. After first stating to the jury that if they found from the evidence that the person named in the information was the owner of the animal, and that the gelding was permitted to run upon the range, the instruction then proceeds: "Proof of the further fact that said gelding was shortly thereafter in the possession of the defendant is sufficient to put upon defendant the burden of explaining such possession." The words "proof of the further fact," as used, did not say to the jury that proof of possession had been made, but the fair and, we think, the only reasonable inference from the context is that, if they found from the evidence that such proof had been made, then the burden of explaining it was upon the defendant. This is made clear by the succeeding portion of the instruction, when the court alluded to the presumption arising from the fact of possession of range stock, and added: "if you find such fact from the evidence."

A feature of the above instruction not discussed by counsel we think should be mentioned here, in order that no apparent confusion may exist between this case and other decisions of this court in larceny cases. By the instruction in this case the burden of explaining possession is placed upon the defendant. The instruction upon its face apparently conflicts with the rule announced by this court in *State v. Walters*, 7 Wash. 246, 34 Pac. 938, 1098. An instruction in that case contained the following:

"In this case if the jury believe from the evidence beyond a reasonable doubt that the property described in the

information was stolen, and that the defendant was found in possession of the property, soon after it was stolen, then said possession is in law a criminating circumstance tending to show the guilt of the defendant unless the evidence and the facts and circumstances proved show that he may have come honestly in possession of it."

The instruction was held to be erroneous on the theory that possession of recently stolen property is only a circumstance to be considered by the jury in connection with all other evidence in a given case. In *State v. Bliss*, 27 Wash. 463, 68 Pac. 87, the respondent's counsel urged this court to overrule *State v. Walters, supra*, in the above mentioned particular, but we declined to do so, and approved the holding in the former case as the established doctrine of this court. The instruction in the case at bar was, however, given under the authority of § 7114, Bal. Code, which is as follows:

"In all prosecutions for larceny under the last preceding section, where the animal alleged to have been stolen was permitted by its owner to run on the range, proof of possession of the animal by the person accused of stealing the same shall be prima facie evidence that the accused acquired possession thereof recently, and shall have the effect of throwing on the accused person the burden of explaining such possession."

The previous section, referred to in the above quoted one, relates to the larceny of animals, and it will be seen that the quoted section expressly provides that, when the animal alleged to have been stolen was permitted by its owner "to run on the range," proof of possession by the accused shall be prima facie evidence that it was acquired recently, and shall throw the burden of explaining it upon the accused. The statute therefore declares an exception to the general rule adopted by this court in ordinary lar-

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ceny cases, the exception being restricted to the larceny of animals permitted to run upon the range.

The statute was passed in 1895, and *State v. Walters* was decided prior to this statute. That case involved the larceny of a horse, but the opinion does not disclose whether it was a range animal or not. *State v. Bliss, supra*, however, involved another class of property, and we have made the above observations in order to make it clear that, while we adhere to the general rule reannounced in that case, we at the same time recognize the exception made by the statute cited. We have already said, in *State v. Bliss*, that the general rule adopted is supported by eminent authority, and we now see no reason for changing it, unless it shall be done by the legislature as in the case of the exception herein discussed. The instruction in the case at bar came within the exception, and is therefore not erroneous.

It is assigned that the court erred in refusing to reopen the case and allow appellant to make proof of the handwriting of a certain letter which had already been admitted in evidence. Appellant recognizes that the reopening of the case was largely a discretionary matter with the court, but bases this claim of error chiefly upon the remark of the court made at the time. It was appellant's contention that the letter gave him authority to take possession of the animal, or that he at least believed it did. It was therefore admitted in evidence by the court as bearing upon the question of intention, and was so expressly stated by the court when it was admitted. When afterwards the application was made to reopen the case, appellant's counsel stated that he wished to prove the handwriting of the letter, and the court remarked as follows: "The motion will be overruled because in the opinion of the court it is

no issue in this case, and the jury will disregard from their deliberations in the matter the matter suggested in the offer of this testimony." Appellant contends that the remark of the court had the effect to exclude the contents of the letter from the consideration of the jury, and that it was a comment upon the evidence. We think the effect of the remark was directly opposite to that which appellant claims for it. The letter was already in evidence as bearing upon appellant's intention. The handwriting was therefore not an issue, but the letter was to receive full consideration for the purpose for which it had been admitted. The remark to the jury that they should disregard in their deliberations the matter suggested by counsel was in effect saying that the handwriting was not in issue, and that they should consider the letter without reference to that subject. We think the court did not err in this particular.

It is urged that the court erred in refusing the following instruction:

"Where the alleged owner of goods or property alleged to have been stolen would not swear positively to the property being his, it is your duty to acquit, as this is not sufficient proof of ownership."

We think the testimony as to ownership was sufficiently positive to have made the giving of the above instruction erroneous. The prosecuting witness testified in chief that the horse was his, and what he may have said upon cross-examination was matter for argument to the jury, but was not properly the basis of such an instruction as was requested.

The court gave the following instruction:

"You are instructed that if this defendant took this horse under a claim of right, and you find a fair pretense for so taking said horse, it is your duty to acquit this de-

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fendant, though you should find he was mistaken in his claim to said horse."

It is urged that the above instruction was a virtual admission that appellant had introduced that class of testimony which, when done, the law says shall not be submitted to a jury, and that if there was sufficient testimony to warrant the instruction, there was sufficient to warrant the court in taking the responsibility upon himself which he inadvertently gave to the jury. It cannot be the law that, whenever the defense to a prosecution for larceny is a taking of possession under claim of right, the cause shall not be submitted to a jury in a criminal case. It is possible for the proofs to be such as would justify the court in saying that no criminal intent is involved, and that the parties should be referred to a civil action for the settlement of a mere legal controversy. But we apprehend such proofs must be so convincing as will practically preclude, in the mind of a reasonable man, the possibility of a criminal intent. We do not think the proofs here presented such a case. The court, by its instructions, gave the appellant the benefit of this defense, leaving the jury to say whether he had "a fair pretense for so taking said horse." Under the evidence in this case, we think the court did not err.

For the foregoing reasons, we find no reversible error, and the judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 4853. Decided December 3, 1903.]

G. S. MEALS *et al.*, Respondents, v. THE DE SOTO PLACER
MINING COMPANY, Appellant.¹

CORPORATIONS—CONTRACTS—SUFFICIENCY OF EVIDENCE. There is sufficient evidence to support a judgment against a corporation where it appears that the services were rendered at its instance, for its benefit, and under a contract made by its agent.

APPEAL—REVIEW—THEORY OF TRIAL. A cause must be tried in the supreme court on the same theory on which it was tried below.

PLEADING—VARIANCE. Where the complaint alleges a contract of sale, and the answer sets up a conditional sale denying that the machine was as represented, upon which defense the case was tried, the defendant cannot complain of a variance between the complaint and proof.

DEMURRER—SEVERAL CAUSES OF ACTION. A general demurrer for want of sufficient facts, where there are two causes of action, is properly overruled where the second cause of action is properly stated.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 11, 1903, upon the verdict of a jury rendered in favor of the plaintiffs. Affirmed.

P. C. Dormitzer, for appellant.

Shank & Smith and *J. M. Jeffery*, for respondents.

DUNBAR, J.—This is an appeal from a judgment of \$40.50. The action was brought to recover judgment for the sale of a concentrating mining machine and for work performed by the respondents, a partnership, for the appellant, judgment being demanded for \$353.50. The case was tried by a jury, and verdict rendered for \$40.50.

The assignments of error are that the court erred, in refusing appellant's motion for a nonsuit; in refusing to

¹Reported in 74 Pac. 470.

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instruct the jury to return a verdict for appellant; in allowing respondents to prove services of G. S. Meals, one of the claimed partners, rendered by him personally as superintendent of appellant's mine, for the reason that respondents' complaint does not seek a recovery for such services; in denying appellant's motion for a new trial, and to vacate and set aside the verdict of the jury, on the ground that there was no proof of Meals' services as superintendent of appellant's mine having any application to the partnership affairs of the respondents; that there was a total failure of proof in this, to wit, that the variance between the allegations and proof changed and altered the entire scope and meaning of the action, and was not merely a variance, but a failure of proof; that the court erred in refusing to sustain appellant's demurrer to respondents' complaint as to the second cause of action, because respondents' second cause of action does not state facts sufficient to constitute a cause of action.

We think there is no merit in any of these assignments. Even if it had not appeared from the testimony of the respondents that the contract was made in the name of, and the services rendered for the benefit of, the appellant company, and even if it had not appeared therefrom that De Soto, with whom the contract was made, was agent for the appellant company, these matters are all proven by the testimony of the appellant. It plainly appears from the whole testimony, not only that the services were rendered at the instance of the appellant, but that they were rendered for the benefit of the appellant corporation, and that the contract was made with an agent of the appellant.

Again, these questions were not raised in the trial of the case below, but the whole contest there was over the merits of the machine which appellant admitted that it

conditionally bought, and this court has uniformly held that causes here will be tried on the theory upon which they were tried in the court below.

So far as the variance between the allegations and proof is concerned, the court refused to sustain appellant's motion for a nonsuit for the reason that appellant had not been surprised. The allegation, it is true, was of a contract of sale, but the answer alleged a contract of conditional sale, denying that the machine was what it was reported to be, and it was upon this question that the case was tried out. It having been tried on the allegations relied upon by appellant, and appellant having prepared its defense upon this theory, there is no just ground for complaint in this respect.

The demurrer was properly overruled, not only because the second cause of action was properly stated, but for the reason that there was no demurrer to the second cause of action, the demurrer being that the complaint did not state facts sufficient to constitute a cause of action. Even if the second cause of action had been insufficient, there was yet enough left in the complaint to constitute a cause of action.

There being no error in any respect, the judgment will be affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

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[No. 4697. Decided December 8, 1903.]

ALBERT G. TOWLE, *Respondent*, v. STIMSON MILL COMPANY, *Appellant*.¹

33	806
34	474
35	227

MASTER AND SERVANT—NEGLIGENCE—DEFECT CAUSING THE MACHINE TO START AUTOMATICALLY—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for personal injuries to a sawyer sustained by reason of the automatically starting of a ten-block shingle machine, a verdict for the plaintiff should not be disturbed where there was evidence that the defendant knew that the machine had started up automatically, due to defects in the clutch which were out of sight and not known to plaintiff, that such a machine was unsafe, and that the defect could be remedied by a spring not made or sent out with such machines, that the machine was repaired five days before the accident, there being conflict in the testimony as to whether it was properly repaired and as to every material point, although such machines were in common use without the spring in the clutch.

SAME—PROOF OF NEGLIGENCE—VERDICT—CONCLUSIVENESS. While negligence must be shown affirmatively, it may be deduced as an inference from other facts proven, and the courts will not interfere with a verdict where there is substantial conflict in the testimony.

SAME—NEGLIGENCE—INSTRUCTIONS. Certain instructions on the subject of negligence held properly refused or sufficiently covered in the general charge.

SAME—EVIDENCE OF PRIOR DEFECTS AND REPAIRS. In an action for personal injuries to a servant, evidence of defects in a machine prior to the making of certain repairs, is admissible where the sufficiency of such repairs was one of the main issues in the case.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 18, 1903, upon the verdict of a jury rendered in favor of plaintiff for \$5,500 damages for personal injuries sustained while operating a ten-block shingle machine, after overruling defendant's

¹Reported in 74 Pac. 471.

motions for a nonsuit, for judgment notwithstanding the verdict, and for a new trial. Affirmed.

Root, Palmer & Brown, for appellant. It was not shown that the master knew of the defect. The machine ran satisfactorily for five days after the repairs, and the defect could not have been discovered by ordinary care and inspection. *Wilson v. Northern Pac. R. Co.*, 31 Wash. 670, 71 Pac. 713; *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457; *Patton v. Texas Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275. An employer is not required to furnish the best and newest machinery; the test is general use. *Bernhard v. Reeves*, 6 Wash. 424, 33 Pac. 873; *Jennings v. Tacoma R. & M. Co.*, 7 Wash. 275, 34 Pac. 937; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Hogele v. Wilson*, 5 Wash. 160, 31 Pac. 469; *Anderson v. Inland Tel. etc. Co.*, 19 Wash. 575, 53 Pac. 657. The servant was in as good a position as the master to know of the defect. *Glass v. Colman*, 14 Wash. 635, 45 Pac. 310; *French v. First Ave. R. Co.*, 24 Wash. 83, 63 Pac. 1108; *Wilson v. Northern Pac. R. Co.*, *supra*. And he assumes the danger from the machinery under his care. *Week v. Freemont Mill Co.*, 3 Wash. 629, 29 Pac. 215; *Schulz v. Johnson*, 7 Wash. 403, 35 Pac. 130; *Olson v. McMurray Cedar L. Co.*, 9 Wash. 500, 37 Pac. 679; *Danuser v. Sellar & Co.*, 24 Wash. 565, 64 Pac. 783; and the *French*, *Hoffman*, and *Anderson* cases, *supra*. The starting of the machine was equally and more plausibly attributable to several causes besides the defect in the clutch, and for this reason the master is not liable. *Weideman v. Tacoma R. & M. Co.* 7 Wash. 517, 35 Pac. 414; *Mitchell v. same*, 9 Wash. 120, 37 Pac. 341; *Sauer v. Union Oil Co.*, 43 La. An. 699, 9 South. 566; *Hansen v. Seattle Lumber Co.*, *supra*. The fact that a machine starts automatic

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Citations of Counsel.

ally is not sufficient to establish negligence. *Weideman v. Tacoma R. & M. Co.*, *supra*; Bailey, Master & Ser., §§ 1614, 1616, 1665, 1599; *Dingley v. Star Knitting Co.*, 134 N. Y. 552, 32 N. E. 35; *Redmond v. Delta L. Co.*, 96 Mich. 545, 55 N. W. 1004; *Robinson v. Wright*, 94 Mich. 283, 53 N. W. 938; *Kuhns v. Wisconsin etc. R. Co.*, 70 Iowa 561, 31 N. W. 868; *Hughes v. Oregon Imp. Co.*, 20 Wash. 294, 55 Pac. 119; *Soderman v. Kemp*, 145 N. Y. 427, 40 N. E. 212; *Roberts v. Boston etc. R. Co.*, 83 Me. 298, 22 Atl. 174. The existence of a defect or the happening of an accident does not establish negligence. Dresser, Employer's Liability, p. 209; 1 Bailey, Master & Ser., §§ 103, 104, 1613, 1665-6; *Kirby v. Rainier-Grand Hotel Co.*, 28 Wash. 705, 69 Pac. 378; *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98; *Brymer v. Southern Pac. R. Co.*, 90 Cal. 496, 27 Pac. 371; *Texas Pac. R. Co. v. Thompson*, 71 Fed. 531; *Snodgrass v. Carnegie Steel Co.*, 173 Pa. St. 228, 33 Atl. 1104; *Indianapolis etc. R. Co. v. Toy*, 91 Ill. 474; *Huff v. Austin*, 46 Ohio St. 386; *Toledo etc. R. Co. v. Moore*, 77 Ill. 217. The circumstance that a servant was injured by defective machinery does not prove negligence. *Duntley v. Inman etc. Co.* (Ore.), 70 Pac. 529; *Simpson v. Pittsburg Loc. Works*, 139 Pa. St. 245, 21 Atl. 386; *Texas & Pac. R. Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707; *Patton v. Texas & Pac. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275; *Wojciechowski v. Spreckels' Sugar Refining Co.*, 177 Pa. St. 57, 35 Atl. 596; *Brownfield v. Chicago etc. R. Co.*, 107 Iowa 254, 77 N. W. 1038; *Olson v. Great Northern R. Co.*, 68 Minn. 155, 71 N. W. 5.

Reynolds, Park & Ingersoll (Wilshire & Kenaga, of counsel), for respondent. The evidence in this case sustains the verdict. *Hencke v. Babcock*, 24 Wash. 556, 64

Pac. 755; *Gulf C. etc. R. Co. v. Haden* (Tex.), 68 S. W. 530; *Connors v. Durite Mfg. Co.*, 156 Mass. 163, 30 N. E. 559; *Thiel v. Kennedy*, 82 Minn. 142, 84 N. W. 657; *Monmouth Min. etc. Co. v. Erling*, 148 Ill. 521, 36 N. E. 117, 39 Am. St. 187; *Shoemaker v. Bryant Lumber etc. Co.*, 27 Wash. 637, 68 Pac. 380; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111; *Goldthorpe v. Clark-Nickerson L. Co.*, 31 Wash. 467, 71 Pac. 1091. The sufficiency of the inspection was a question for the jury. *Jacobson v. Johnson*, 87 Minn. 185, 91 N. W. 465.

PER CURIAM.—This was an action for personal injuries brought by respondent, Albert G. Towle, against appellant, Stimson Mill Company (a corporation), in the superior court of King county. Verdict for respondent. This is an appeal from the judgment entered thereon by the Stimson Mill Company.

Appellant makes six assignments of error, the first four of which present practically the same question—that there was not sufficient evidence adduced at the trial of the cause to justify the verdict under the issues. The fifth assignment relates to the giving of certain instructions to the jury, and the refusal to give certain others requested by appellant. The sixth and last assignment alleges that the trial court erred in admitting certain testimony. The evidence is voluminous, but it is important that its salient features should be noticed.

On the 23rd day of May, 1902, at the city of Ballard, respondent was in the employ of appellant company in its shingle mill, in charge of and operating a ten-block machine known and designated as Machine No. 1, in the capacity of a sawyer, when he sustained the injuries of which he complained. A machine of this description consists of a large wheel, two circular saws, a clutch, certain pulleys,

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shafts and bearings. There is a massive iron or steel wheel called "the rim", about ten feet in diameter. This wheel revolves on bearings four feet from the floor. It has ten compartments, each of which is intended to receive a shingle block. It was one of the sawyer's duties to place the blocks into these openings. As this large wheel revolves, these blocks are brought in contact with the saws set horizontally underneath the "rim", thus cutting up the blocks into shingles. The remnant of a block is called a "spault," which is dropped out by striking a spault pin; there being one pin for each compartment, projecting about one inch above the wheel, and going around with it.

The machine was put in motion and stopped by means of a clutch, consisting of an iron pully with a steel band about the same termed the "clutch band." This band was tightened upon, or loosened from, the pully by a wedge at the end of a rod extending under the machine from the position of the sawyer on the opposite side of the machine, about nine feet from his stand. This rod was moved by a lever at the sawyer's position, in front of and near his knees. The clutch was out of sight, and about nine feet from where the sawyer stood while operating the machine. The friction of the clutch band upon the iron pulley put the machine in motion. When the band was open, the friction was off and the machine was at rest. Pressing down on the lever starts the machine; raising it stops it. If, when the machine is at rest and the lever is up, it should start up automatically, the lever would remain in the same position.

At the time of the accident, respondent had been in the employ of the appellant at its mill about three and one-half years, off and on, and had worked on the machine in question as a sawyer from two and one-half to three months

just prior to the accident. He was not a machinist. If the machine got out of repair, it was the sawyer's duty to call the matter to the foreman's attention, who either made the repairs himself or supervised the work. It was among the foreman's duties to inspect each machine in the mill twice each day—at noon and after quitting work at six o'clock in the evening. The machine was inspected by the foreman at noon about two and one-half hours before the accident.

The gravamen of respondent's complaint is that he was injured by reason of the defective clutch in, and a part of, the machine, causing it to start up automatically without warning when at rest while he was, in the line of his duty, adjusting a spault pin; and it is alleged that the pin caught in the sleeve of his jumper and dragged his right arm into the cogwheels on the side of the rim, causing him serious and permanent injuries; and that he had no knowledge or warning of such defect, which was known, or should have been known, by appellant company. The testimony on behalf of respondent tends to support his contentions in that regard. His testimony also tended to show that this machine was installed at appellant's mill ten or eleven years previous to the accident, that it had on previous occasions started up suddenly of itself, and was unsafe for the purposes intended. Respondent's and appellant's expert witnesses agreed that, if a ten-block machine should start up automatically, there must be some defect in the clutch. Gus Brinkman, foreman of the appellant company for some time previous to March, 1901, in response to the questions propounded to him by respondent's counsel, testified as follows:

"Q. Did you ever know of that machine starting of itself automatically? A. I did. Q. State to the jury what caused that machine to start of itself, and what you did,

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if anything, to remedy that defect? A. Saw dust would get in there, the spring being too tight; I attached a spring to it to open this band. Q. Now then, Mr. Brinkman, proceed. A. The band being too tight I put on a spring to spread it, so as to relieve the band from the iron pulley which runs on the inside of that band there. . . . Q. Was that spring put there about the time that you left the mill? A. It was. Q. When did you leave the mill? A. Somewhere about the middle of March, a year ago. Q. And up to that time that spring was there to prevent the starting of the machine of itself? A. Yes, sir. . . . Q. Would the machine be safe—would you consider a ten-block machine safe—this particular ten-block machine, without that spring which you put there to prevent— A. No, sir; it would not be safe. Q. Did you ever notify or warn the men who were working on that machine on account of this defect? A. I did.”

This witness said on cross-examination that all such machines ought to have springs on them, but that they do not come with them. Mr. Brinkman was corroborated by the testimony of several witnesses on behalf of respondent, who were former employees of appellant, as to the necessity of putting that spring on the clutch to hold the band apart, so that it could not start the machine up while at rest, and that this particular machine was not safe without such spring; that it had started up of itself at different times previous to the accident; and that a ten-block machine starting automatically is defective.

The respondent testified in his own behalf, that he raised the lever and stopped the machine to adjust a spault pin, when the machine suddenly started up, and the pin caught his sleeve, dragged his right arm into the cogwheels at the side of the rim, and caused the injuries; that he had no notice whatever at that time of any defects in the machine; and that they were not obvious. There was testi-

mony corroborating him to the effect that the machine was at rest when he proceeded to make the adjustment of the "pin", and in regard to the machine starting automatically, and that the defects in the clutch were out of sight, and that this machine was defective in and about the clutch band.

On behalf of appellant, three dealers in ten-block machines, and several expert operators of such machines, some of whom were employees of the Stimson Mill Company, testified that no spring was manufactured or sent out with these machines to be attached to the clutch band, and they never saw a machine of that description with a spring so attached. Some of appellant's witnesses also testified that the clutch band, being made of spring steel, was itself a spring. Witness Joseph Donoghue testified that he was present when the machine in question was installed, and that there was no spring on the clutch band at that time. There was considerable testimony on behalf of appellant, that such machines were in general use in shingle mills, and were of standard grade; that this particular machine, though an old model, was reasonably safe and suitable for the purposes intended; that the clutches on the old and new models worked on the same principle.

It further appeared, that on the 18th day of May, 1902, five days prior to the accident, the clutch was taken out of the machine to be repaired; that the repairs were made by one Hackett under the direction of Mr. Donoghue, the foreman; that from that time to the happening of the accident there was no hitch in the operation of the machine, and it worked satisfactorily after the accident without repairing the clutch. Appellant's evidence further tended to show that respondent assisted in repairing the clutch—a statement, however, which was denied by respondent while on

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the witness stand. The evidence is voluminous and conflicting as to whether the mechanism of the clutch was in plain view, and, if defects existed, whether respondent could, by the exercise of ordinary diligence, have discovered them. Such conflict cannot be reconciled. David McVay, a manufacturer of shingles of almost twenty years experience, familiar with the mechanism of ten-block machines similar to the one in question, a witness for appellant, testified that the clutch was not open and in plain view: "It is on the back part of the machine, and you cannot see it at all times—not unless you get in and examine closely, and then it is difficult to see it."

There was some conflict in the testimony in regard to the "clutch" being properly repaired on the 18th day of May, 1902, previous to the accident. C. A. Donoghue, appellant's foreman at the time of the accident, testified, that he had inspected this machine on the day of the accident at the noon hour; that it was in first class condition; that his orders were to repair any defects promptly, which were invariably followed; that, when respondent was caught in the cogwheels, witness was forty or fifty feet from the machine; that it took him a few seconds to get over there, when he helped pull the rim back. He testified also that the lever was down at that time, which was denied by respondent, and by Swayze, the block piler at this machine, testifying for respondent.

The foregoing is, in substance, all of the evidence going to the questions of negligence and contributory negligence. Plainly, there was a conflict on every material fact, and, if the facts testified to by the respondent entitled him to recover, the verdict is not insufficient for want of evidence to support it. It seems to us that the facts do warrant a recovery. It is true that the fact that an employee is

injured while in the service of the employer carries with it no presumption of negligence on the part of the employer, and that the employee must show affirmatively that the employer has been guilty of negligence, in order to warrant a recovery. This court has repeatedly so held in effect. *Hansen v. Seattle Lumber Co.*, 31 Wash. 604, 72 Pac. 457. In *Shannon v. Consolidated etc. Min. Co.*, 24 Wash. 119, 64 Pac. 169, we said: "It is settled in this country, as a general rule, that the master is charged with the duty of furnishing his servant a reasonably safe place in which to work, and impliedly says to him that there is no other danger in the place than such as is obvious and necessary;" and in *Hoffman v. American Foundry Company*, 18 Wash. 290, 51 Pac. 385, we held that: "The law is well settled that the master discharges his duty when he provides machinery that is of ordinary character and reasonably safe. . . . Employers are not insurers and the law recognizes that absolute safety is unattainable. They are liable for the results of their negligence, and not for the dangers necessarily connected with the service." See also: *Decker v. Stimson Mill Co.*, 31 Wash. 522, 72 Pac. 98; *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091. But it is equally true that negligence is proved as any other fact or facts are proved; it may be shown by direct evidence, or it may be deduced as an inference from other facts proven; and, when it is once shown by substantial testimony, its weight and sufficiency is a question for the jury.

The case of *Hencke v. Babcock*, 24 Wash. 556, 64 Pac. 755, was in some of its features similar to the one at bar. The action was brought by respondent, Hencke, against appellants, Babcock and wife, to recover compensation for personal injuries sustained by respondent while he was in

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the employ of appellants as a separator tender in their business of threshing grain. The separator was propelled by appellant's steam engine, alleged to have been defective—liable to start automatically and suddenly, after it had been stopped by the engineer. The defects in the engine complained of were known to appellants and unknown to respondent, who was not an engineer. While respondent was engaged in the removal and substitution of the concaves, and straightening the teeth on the concaves and cylinder, when the machine was at rest, the separator suddenly, without warning, started automatically, caught his hands between the teeth of the cylinder and the teeth on the concaves, and injured him. At page 560, in the opinion of the court, the following language is used:

"It must have been manifest to the jury from the evidence that a man of ordinary prudence would have a right to expect that when the engine was stopped it would remain stationary until started by the engineer in charge. The testimony shows that the engine was stopped for the express purpose of giving Hencke an opportunity to adjust the teeth on the cylinder and concaves, and, if the jury believed from the evidence that he had no knowledge of any defect in this engine, then they were justified in finding that he was acting the part of an ordinarily prudent and careful man when he was doing this work, and that he had a right to believe the power would remain inactive until he had finished and had so informed the engineer."

The question of contributory negligence was also involved in that case, and speaking thereon we said:

"... that the question of contributory negligence is for the jury to determine from all the facts and circumstances of a particular case, and that it is only in rare cases that the court would be justified in withdrawing it from the jury."

In *Gardner v. Michigan Central Railroad*, 150 U. S. 349, 361, 14 Sup. Ct. 140, 37 L. Ed. 1107, the court said:

"The question of negligence is one of law for the court only where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

Mooney v. Connecticut River L. Co., 154 Mass. 407, 28 N. E. 352, was an action of tort for personal injuries. At page 409, in the opinion, the court uses this language:

"There was evidence that the carriage of the sawing machine started up, and injured the plaintiff, when it was left at rest with the steam shut off, and the lever locked which was used to start and stop it. It was proved and not disputed that a machine which would do that was improperly constructed, or improperly adjusted, and was unsafe. There was evidence that the defendant's foreman knew several days before the accident, that the machine had 'run away,' or started up when no one was near it. The jury were warranted in finding that the defendant was negligent in not seeing that it was properly constructed and adjusted, so as to be safe when it was originally put in position, or in not discovering its dangerous condition and making it safe before the accident."

And the court held the plaintiff entitled to recover although he knew that the machine had run away. To the same effect is *Connors v. Durite Mfg. Co.*, 156 Mass. 163, 30 N. E. 559. The plaintiff in that case was a foreman, and was injured by the engine starting up while at rest by reason of a leak in the throttle-valve. It appears that down to the time of the accident no inspection of the throttle-valve was made, which could readily have been done. The court held that:

"While a master may delegate to competent servants the making of ordinary repairs such as a machine requires from day to day, yet as to other repairs the master cannot escape responsibility by merely showing that he has em-

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ployed intelligent and competent servants, and has furnished them with suitable materials; but he must exercise a reasonable care and supervision over them, and see that they do their duty. . . . The fact, therefore, that the engine had some three weeks before been overhauled and repaired does not necessarily exempt the defendant from liability."

See, also, *Gulf, C. etc. R. Co. v. Haden* (Tex. Civ. App.), 68 S. W. 530; *Jacobson v. Johnson*, 87 Minn. 185, 91 N. W. 465.

The able counsel for appellant contend that a machine starting automatically is not evidence of negligence. They cite a number of cases to the effect that, as between master and servant, the mere happening of an accident to the latter does not render the master liable, unless he is guilty of negligence, which must be alleged and proved; among which is the case of *Dingley v. Star Knitting Co.*, 134 N. Y. 552, 32 N. E. 35, where the plaintiff's minor son was injured by a machine starting automatically. No defect in the machine was shown. On page 558, the court applied the law of the case to the facts as follows:

"Now in the light of the evidence to which we have referred, it seems to be apparent that, assuming it to be true that the machine started on three occasions testified to by Dingley, the inference legitimately deducible from it is not that the machine was defective, but rather, that in his haste to go home, of which acknowledgment is made, he failed to shift the belt entirely from the tight to the loose pulley, thus making it possible for it to run on again and start the machine in motion."

But in the case at bar, as we have shown, the testimony on behalf of respondent and of appellant was in direct conflict as to the condition of the clutch and clutch band on this particular machine, at and before the time of the accident; and also on the question whether the clutch was

properly repaired and adjusted in the machine a few days before respondent received his injuries, as well as on the question whether the alleged defects were open or concealed. This is not, therefore, a case of a machine starting automatically without any apparent cause. On the contrary, if the respondent's testimony is to be believed, there was a cause for the starting of the machine, which was known to the appellant, or could have been known by the exercise of reasonable care. The cases cited are, for this reason, not in point, and it is not necessary to discuss their effect on a question of fact to which they might be applicable.

After a careful examination of the record, we think there was sufficient testimony adduced at the trial to maintain the material issues tendered in respondent's behalf. And when there is a substantial conflict in the evidence the courts will not interfere and set the verdict of a jury aside. *O'Rourke v. Jones*, 22 Wash. 629, 61 Pac. 709. We are therefore of the opinion that the trial court committed no error in denying appellant's several motions for a nonsuit, for judgment in its favor on the pleadings and evidence, and for a new trial.

The appellant contends that the trial court erred in refusing to give certain instructions to the jury, as requested. Exceptions were taken to each refusal. Nine of such proposed instructions appear in the record. We have examined *seriatim* the instructions given by the superior court. The charge was full and explicit. We think that the propositions of law were correctly stated by the judge, and the facts fairly submitted to the jury, in consonance with the legal principles enunciated in this opinion; that some of appellant's requests, while they contain correct abstract propositions, do not apply to the evidence; that as to the

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remaining requests they were sufficiently covered by the general charge. *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1192; 2 Thompson, Trials, § 2352.

The trial court did not err in admitting testimony as to the defects in the machine prior to the 18th of May 1902, at the time the clutch band was repaired. The nature and sufficiency of such repairs was one of the main issues in the case. See *Connors v. Durite Mfg. Co.*, *supra*, and authorities above cited.

No reversible error appearing in the record, the judgment of the superior court must be affirmed, and it is so ordered.

[No. 4754. Decided December 3, 1903.]

L. H. WHITNEY, *Respondent*, v. JERRY D. KNOWLTON,
Appellant.¹

33	319
335	281
33	319
338	534
33	319
141	106

APPEAL—RECORD—REVIEW—AFFIDAVITS—HOW BROUGHT UP. Affidavits used upon a motion to vacate a default judgment must be brought up by bill of exceptions or statement of facts, in order to secure a review of questions of fact tried below on the affidavits.

ACTIONS—COMMENCEMENT—SUMMONS BY PUBLICATION—FILING AFFIDAVIT OF NONRESIDENCE—DELAY. A delay of three days after the verification in filing an affidavit of nonresidence on which publication of a summons in a tax lien foreclosure was secured, is not a fatal defect in the service invalidating the judgment, where no change occurred during the delay after making the affidavit, and there was no actual injury caused thereby.

JUDGMENT—VACATION OF DEFAULT—GOOD CAUSE TO BE SHOWN. Under Bal. Code, § 4880, a nonresident defendant, served by publication in a tax lien foreclosure, is not entitled to the vacation of a default judgment within one year as a matter of right, but good cause must be shown.

¹Reported in 74 Pac. 469.

Appeal by defendant from an order of the superior court for Pierce county, Chapman, J., entered March 25, 1903, after a hearing upon affidavits, denying the motion of a nonresident defendant to vacate a default judgment for irregularities in the publication of the summons in a tax lien foreclosure. Affirmed.

Hiram C. Gill, Heber B. Hoyt, and Hermon S. Frye, for appellant. Where there is any doubt as to the justice of the motion, the default should be vacated. *Cameron v. Carroll*, 67 Cal. 500, 8 Pac. 45. An affidavit of merits was not required. *Walla Walla Printing & Pub. Co. v. Budd*, 2 Wash. Ter. 336, 5 Pac. 602; *Mackubin v. Smith*, 5 Minn. 367 (5 Gil. 296). The delay in filing the affidavit vitiated the service. *New York Baptist Union etc. v. Atwell*, 95 Mich. 239, 54 N. W. 760; *Priestman v. Priestman*, 103 Iowa 320, 72 N. W. 535; *Armstrong v. Middlestadt*, 22 Neb. 711, 36 N. W. 151; *Adams v. Homer*, 98 Mich. 51, 56 N. W. 1051. A nonresident may appear within one year and defend as a matter of right. *Lord v. Hawkins*, 39 Minn. 73, 38 N. W. 689; *Mueller v. McCulloch*, 59 Minn. 409, 61 N. W. 455.

Fremont Campbell, for respondent.

FULLERTON, C. J.—In 1898 the appellant was the owner of two certain lots in the city of Tacoma, which were duly assessed for that year by the proper authorities for state, county, and city taxes. The taxes were suffered to become delinquent, and were paid by the respondent, who took out a certificate of delinquency therefor. Subsequently the respondent paid the taxes for the years 1900 and 1901, and in August of 1902 commenced an action to foreclose his lien for the same. Service of the summons in the action was made by publication. No appearance was made by the

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appellant, and judgment was entered in the proceedings as upon a default, foreclosing the lien and directing a sale of the property to satisfy the same. The property was afterwards sold on an execution issued on the judgment, at which sale the respondent became the purchaser, whereupon a deed of the property was issued to him. Afterwards, and prior to the expiration of a year from the date of the judgment, the appellant appeared and moved the court to vacate the default, set aside the judgment and cancel and declare void the deed, supporting his motion with sundry affidavits filed therewith. The respondent resisted the motion, filing counter affidavits, after which the matter was heard by the court, and the motion denied. This appeal is from the order denying the motion.

Three errors are assigned for reversal: (1) that the affidavit for publication of summons is false and untrue; (2) that the affidavit for publication of summons was not filed with the clerk of the court until three days after the same had been verified; and (3) that the applicant was entitled to have the sale set aside as a matter of right under § 4880 of the code.

The first objection urged calls for an examination of the evidence before the trial court, and this has not been brought here by the record. The questions of fact at issue were tried on affidavits, and the appellant has caused a part or all of them to be transcribed by the clerk, and certified into this court by that officer, as a part of the transcript. We have repeatedly held, that affidavits brought into this court in this manner cannot be considered; that before they can be considered they must be brought into the record by a bill of exceptions or statement of facts, and authenticated by the certificate of the trial judge, so that this court may know that it tries the questions of fact sub-

mitted upon the same evidence, and upon all the evidence, that the trial court had before it. This question was recently reviewed by the court in the case of *Chevalier & Co. v. Wilson*, 30 Wash. 227, 70 Pac. 487, where the cases will be found collected.

The affidavit of nonresidence, on which the publication of summons was based, was verified on August 15, 1902, and filed with the clerk of the court on August 18, 1902, and it is argued that such an unreasonable length of time elapsed between the time of verification and the time of filing as to render the service void. In *New York Baptist Union v. Atwell*, 95 Mich. 239, 54 N. W. 760, it was held that a delay of five days between the making and filing of the affidavit was fatal to the jurisdiction of the court, but in a subsequent case, *Adams v. Hosmer*, 98 Mich. 51, 56 N. W. 1051, a delay of three days was held not to be so. In *Armstrong v. Middlestadt*, 22 Neb. 711, 36 N. W. 151, a delay of one day was held not to be fatal, the court remarking that it did not wish to be understood as going beyond the facts of the case before it, or as holding that an affidavit made several days before the commencement of an action would be sustained. These are the only cases that have been called to our attention where the precise question involved has been touched upon or decided. To our minds, they are not conclusive against the sufficiency of the service shown here.

In matters of formal procedure, even though it be in proceedings so highly important as the process by which a party is brought into court, this court has never exacted anything more than a substantial compliance with the statute. Amendable defects, such as the one in question, have not been held fatal unless injury directly caused thereby has been shown, and it seems to us now that this is the

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just rule. Any other usually leads to a sacrifice of substance to form, and to decisions which shock the sense of justice and right, even in minds trained to the technicalities of the law. Clearly, such would be the effect of a decision sustaining the contention made here. The defendant has had all the notice he would have received had the verification and filing been simultaneous, hence he has suffered no injury in that regard. He makes no contention that he in fact became a resident of this state between the time of the making of the affidavit and its filing, nor does he contend that between those dates the affiant, or any of the persons named in the affidavit, learned his post office address. There was therefore no actual injury; and to hold that injury must be presumed is not to promote justice, but is to violate the rights of a party who has parted with his property relying upon the correctness of the judgment of the court.

The last contention, viz., that the appellant was entitled to a vacation of the judgment as a matter of right, has no foundation in the section of the statute relied upon to sustain it. That section provides that a defendant may be permitted to come in and defend within one year after the rendition of judgment on a service had by publication "on application and sufficient cause shown." To apply within the year is not enough; the application must be accompanied by a showing of cause, and there is no such showing in the case before us.

There being no reversible error in the record, the judgment will stand affirmed.

HADLEY, DUNBAR, ANDERS, and MOUNT, JJ., concur.

33	324
34	608

[No. 4884. Decided December 5, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. J. D. RIDDELL, *Appellant*.¹

CRIMINAL LAW—INFORMATION—PROSECUTING ATTORNEY—DEPUTY. An information subscribed by a deputy prosecuting attorney is sufficient since, Bal. Code, § 6832, requiring informations to be subscribed by the prosecuting attorney, must be read in connection with the later act, Bal. Code, § 4756, providing that deputies shall have the same powers in all respects as their principals.

FALSE PRETENSES—ATTEMPTS—INFORMATION—SUFFICIENCY—PRETENDING OWNERSHIP OF CERTIFICATE. An information charging an attempt to secure money from a bank on a duly endorsed certificate of deposit by falsely pretending ownership thereof, which if successful would have defrauded the payee of the amount of the certificate, states an offence under Bal. Code, § 7165, defining false pretenses, and Bal. Code, § 7437, making attempts to commit any crime punishable, and whether the attempt was successful or not is immaterial.

SAME—FAILING TO ALLEGE POSSESSION. Such an information is not objectionable for failing to allege that the accused was in possession of the certificate, where it is alleged that he falsely pretended to be its owner and bona fide purchaser for value.

SAME—EVIDENCE—SUFFICIENCY TO SUSTAIN CONVICTION FOR ATTEMPT TO DEFRAUD BY FALSE PRETENSES. There is sufficient evidence to sustain a conviction for attempting to obtain money by false pretenses, when it appears that the defendant early in the morning presented for payment at a bank a certificate of deposit that had on the same day been fraudulently secured by others in a bunco game, and which was duly endorsed by the payee, who was still the owner, that defendant claimed to be the owner for value at the time it was presented, but afterwards made a written statement disclaiming any interest in it, and made other contradictory statements concerning the description of the man from whom he claimed to have obtained it, bearing upon defendants fraudulent intent and guilty knowledge; and the presentation at the bank under claim of ownership was sufficient evidence of a demand for payment.

¹Reported in 74 Pac. 477.

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Citations of Counsel.

SAME—EVIDENCE OF ACTS OF OTHERS WHEN DEFENDANT WAS NOT PRESENT. In such a case, evidence of the occurrences whereby the owner was unlawfully deprived of the certificate of deposit is admissible to show title, although it was not claimed that the defendant was connected with the bunco performance itself; and the short time that had elapsed was a circumstance for the jury.

SAME—FALSE REPRESENTATIONS OF DEFENDANT—INSTRUCTIONS. An instruction as to false representations to the bank "or anyone" is not erroneous when read in connection with others following it, where the central idea, repeatedly impressed upon the jury, made it clear that they were to consider only representations made to the bank.

SAME. An instruction as to "any statement made by the defendant" about the certificate after the making of certain false pretenses, is not objectionable as an assumption by the court that such a statement was made by the defendant.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered February 18, 1903, after a trial and conviction of the crime of attempting to obtain money by false pretenses. Affirmed.

Sullivan, Nuzum & Nuzum, and *Robertson, Miller & Rosenhaupt*, for appellant. An information signed by a deputy is insufficient. *Jackson v. State*, 4 Kan. 127. The information is fatally defective in failing to show the name of the person intended to be defrauded. *Owens v. State*, 83 Wis. 496, 53 N. W. 736; *State v. Terry*, 109 Mo. 601, 19 S. W. 206. There was no evidence that defendant demanded payment of the certificate. *Paulson v. State* (Wis.), 94 N. W. 771. The court erred in assuming as a fact in its instructions to the jury, that the defendant had made certain statements in relation to the matter. *Henry v. State*, 64 Ark. 662, 43 S. W. 499; *Jones v. State*, 59 Ark. 417, 27 S. W. 601; *People v. Matthai*, 135 Cal. 442, 67 Pac. 694; *Thompson v. State*, 30 Ala. 28.

Horace Kimball and *Miles Poindexter*, for respondent. To the point that an information signed by the deputy is

sufficient, counsel cited: *Taylor v. State*, 113 Ind. 471, 16 N. E. 183; *Territory v. Harding*, 6 Mont. 323, 12 Pac. 750; *Williams v. People*, 26 Colo. 272, 57 Pac. 701; *State v. Devine*, 6 Wash. 587, 34 Pac. 154.

HADLEY, J.—The information in this case charges that appellant fraudulently and with felonious intent attempted to defraud one Gower by means of certain false pretenses. After a trial the jury returned a verdict of guilty as charged, and the court entered judgment that appellant shall be confined in the jail of Spokane county for the period of one year, and shall pay the costs of the prosecution. This appeal is from said judgment.

It is first assigned as error that the court overruled appellant's objection to the introduction of any evidence, upon the ground of insufficiency of the information, and particularly because the information was not signed by the prosecuting attorney. It was signed "Miles Poindexter, Deputy Prosecuting Attorney." The objection made in the court below was general, and did not specify said reason in particular. Respondent therefore contends that the point was waived and cannot be raised here. Appellant contends, however, that the point raised is jurisdictional, and, inasmuch as it is urged upon that ground, we shall discuss it.

§ 6832, Bal. Code, provides as follows:

"All informations shall be filed in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto. . . ."

Upon authority of the above statute appellant insists that, unless the prosecuting attorney's name is signed to an information, the court is without jurisdiction. An unquali-

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fied reading of the words of the statute, "he shall subscribe his name thereto," would make it necessary for the prosecuting attorney himself to subscribe his own name to all informations. But this court held in *Hammond v. State*, 3 Wash. 171, 28 Pac. 334, that a deputy prosecuting attorney has power to subscribe his principal's name to an information. That holding was based upon § 2142 of the Code of 1881, which provided that deputy prosecuting attorneys should "have the same power in all respects as their principals." The legislature of 1891 enacted a statute upon the same subject which is found in § 4756, Bal. Code. The same words with relation to the power of deputies were retained in the new statute. § 6832, *supra*, was passed by the legislature of 1890, and if any doubt existed after that time as to whether the later statute by implication modified the provision of the Code of 1881 above cited in reference to powers of deputies, no such doubt existed after the passage of § 4756, *supra*, in 1891. The two sections must be read together, and the later statute unqualifiedly grants to deputy prosecuting attorneys as great powers as are granted to their principal. Such power without doubt authorizes them to sign their own names to informations, as was done in this case. The respondent's counsel have discussed this subject extensively in their brief, and have cited many authorities in support of this information as signed. We do not deem it necessary, however, to discuss them, since our statute seems plainly to determine the question. The court therefore did not err in overruling the objection to the introduction of any evidence by reason of the information not being signed by the prosecuting attorney.

It is further urged under this objection that the charging part of the information does not state facts sufficient to

constitute a crime. With the formal parts omitted, the information is as follows:

"The said J. D. Riddell, in the county of Spokane, state of Washington, on the 10th day of November, 1902, did wilfully, unlawfully, fraudulently, and feloniously, with intent to defraud one H. E. Gower, attempt to obtain from the Traders National Bank, a corporation organized and existing under the laws of the United States, doing business in Spokane, certain money, bank notes, and currency of the United States, to wit, the sum of three thousand (\$3,000.00) dollars, of the value of three thousand (\$3,000.00) dollars, the property of said bank, designedly and by color of certain false pretenses which the said J. D. Riddell then and there wilfully, unlawfully, fraudulently, and feloniously made to the said bank, the said pretenses being as follows, to wit, that he, the said J. D. Riddell, was then and there the bona fide purchaser for value and the owner of a certain certificate of deposit in writing which had theretofore been executed, made and issued by the said bank to and in favor of the said H. E. Gower, for the sum of three thousand (\$3,000.00) dollars, being numbered 10,001, dated Spokane, October 15th, 1902, and endorsed by H. E. Gower, the said pretenses then and there being false, and the said J. D. Riddell then and there knowing the same to be false."

We think the information charges a crime. It clearly charges an attempt, by falsely pretending ownership of a certificate of deposit, to obtain money from the Traders National Bank, and that appellant feloniously intended thereby to defraud one Gower. It is also alleged that the certificate had been issued by the bank to Gower, and had been indorsed by him. It thus appeared upon the face of the information that appellant pretended to the bank that he was a bona fide purchaser for value of this indorsed certificate, and thereby attempted to obtain from the bank \$3,000 in money, the amount represented by the certificate. It is alleged that the pretense was false, and that appellant

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knew it was false. If he had succeeded in procuring the money from the bank on a certificate regularly indorsed by the payee, it would have been to the fraud of Gower, as alleged in the information. By the payment of the money the bank would have discharged its debt to Gower, represented by the certificate, and although it is alleged that appellant attempted to obtain money the property of the bank, yet, in the manner he sought to obtain the bank's property, it would have resulted in the fraud of Gower, since the latter could not have obtained the money from the bank after it had once been paid out upon a certificate regularly indorsed by him.

If appellant had succeeded in obtaining the money in the manner attempted, he would have brought himself within the terms of § 7165, Bal. Code, which provides that, "If any person with intent to defraud another shall designedly, by color of any false token or writing or any false pretense, obtain from any person any money, . . . such person shall upon conviction thereof," etc. The allegation of the information shows an "intent to defraud another" by obtaining money from the bank through the means of a false pretense. The mere fact that the attempt was not successful did not eliminate from the act the element of crime, under the provisions of § 7437, Bal. Code, which contains the following:

"Every person who attempts to commit any crime but fails or is prevented or intercepted in the perpetration thereof, is punishable, when no provision is made by law for the punishment of such attempt, . . ."

Following the above quotation the different crimes are classified by reference to the degree of punishment fixed for them, and punishment is then fixed for the attempt to commit the crimes, the same being in each instance less severe than in the case of the completed crime. If the in-

formation properly charges an attempt to commit a crime, it therefore charges a punishable offense under the statute cited.

It is urged, however, that it is not averred that appellant was in possession of the certificate of deposit, and that the false pretenses are not charged to have been made while it was in his possession, or when he was attempting to cash it. We think the allegation that the false pretenses were made in an effort to procure the payment of the \$3,000 represented by the certificate sufficiently shows that they were made when he was attempting to cash it. The mere fact that it is not alleged in so many words that he was in actual possession of the certificate at the time, we think, is not material, since it is alleged that he falsely pretended that he was the owner and its bona fide purchaser for value, and that by means of such false pretense he sought to obtain the money. It being alleged that he claimed to be the bona fide purchaser and owner, the law implies that he at least controlled the certificate, which fact is inseparable from that of actual possession as far as it relates to the effort to procure the money represented by it. We believe the court did not err in overruling the objection to the introduction of any evidence.

It is next urged that the court erred in refusing to sustain appellant's challenge to the sufficiency of the evidence, and in overruling his motion to direct a verdict of not guilty, made at the conclusion of the state's evidence. It is contended that the evidence had not shown any demand by appellant for the payment of the certificate. The evidence tended to show, that Gower was the owner of the certificate which had been issued by the bank as an evidence of the \$3,000 deposited by him; that early in the morning, while waiting for a train at the railroad station, he was

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unsuspectingly beguiled away from there by another, who, under the guise of friendship and the usual pretense of being acquainted with people at Gower's former home—a circumstance ordinarily accompanying a well regulated bunco game—induced him to go to a room some distance from the station. Upon entering the room they found two other men playing at a game of cards. Soon afterwards Gower's pretended friend expressed a desire to enter the game, and asked Gower to loan him some money, saying he would return it as soon as the game was over, as they were only playing for fun. Gower handed him sums of cash from time to time until the amount aggregated about \$200. Afterwards, as a further temporary advancement in this game for fun only (?), he indorsed his \$3,000 certificate of deposit and handed it over, expecting it to be returned at the end of the game. When it was handed over, one of the other men seized it and left the room. Soon afterwards, and before the opening of the bank for business on that morning, Gower and his wife went to the bank and directed that payment of the certificate be stopped.

The appellant was not present during any of the foregoing performances, and was then unknown to Gower, but almost immediately after the bank doors were opened he appeared at the paying teller's desk and presented this certificate of deposit containing Gower's indorsement. The paying teller, having been so instructed by the cashier, took the certificate and wrote upon it, "Payment stopped." The teller referred appellant to the cashier, and he at once sought the latter, to whom he showed the certificate containing both his own and Gower's indorsement. He stated to the cashier that he had advanced money upon the certificate, or had bought it—the witness not accurately remembering which.

We think this evidence of the presentation of the certificate by appellant at the paying teller's window, with the payee's indorsement thereon, unaccompanied with any explanation or words of request concerning it, together with the conversation had with the cashier immediately thereafter, in which appellant insisted that he was the bona fide holder by reason of purchase or advancement, amounted to a demand for payment, as such conduct is ordinarily understood in the usual course of business. The evidence of the state also tended to show that Gower was the owner of the certificate, and that it had passed from his immediate possession in the manner above stated. It was also in evidence that, four days after appellant presented the certificate at the bank, he signed a written statement by which he disclaimed any interest of any kind or character in the certificate of deposit. This written statement was pertinent for the jury to consider as bearing upon the alleged falsity of the representations made at the bank, and upon appellant's intention at the time he presented the certificate, and when he told the cashier he was the holder by virtue of purchase or advancement. Witnesses also testified that appellant stated, after the occurrence at the bank, that he paid \$2,500 for the certificate, and there was also testimony as to certain contradictory statements made by him concerning the description of the man from whom he said he obtained the certificate. This testimony, also, bore upon the questions of false representations, fraudulent intent, and guilty knowledge. We think the evidence was sufficient for the jury, and that the court did not err in refusing to sustain appellant's challenge thereto, or in overruling the motion to direct a verdict of not guilty.

Error is urged as to the competency of certain evidence

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introduced by the state, notably the recounting of the occurrences at the depot and at the card room, when appellant was not present. The purpose of that evidence was to show that the title to the certificate had not passed from Gower, and that he was still the owner. It was not sought to show that appellant was connected with the bunco performance itself, and that was not an issue. The fact that Gower was unlawfully deprived of the possession of the certificate was an independent element in the case, which it was necessary to prove as well as his ownership. Appellant's guilty knowledge and fraudulent intent were distinct elements to be shown by other evidence. However, the short time which elapsed after the occurrence at the card room and the appearance of appellant at the bank with the certificate, we think was a circumstance which could properly be considered by the jury.

Error is alleged upon the following instruction:

"The material allegations in the information are, first, that the defendant in this case, for the purpose of obtaining money upon this certificate of deposit or of defrauding the owner thereof out of the money, represented to the bank, or any one, or remarked to the officials of the bank, that he was a bona fide purchaser for value, and the owner of the certificate of deposit."

The objection urged to the instruction is that the words, "represented to the bank *or any one*" that appellant was the purchaser and owner, were used. It is contended that, as the evidence had disclosed that he made such representations to others after the appearance at the bank, the instruction may have tended to prejudice the jury, and may have led them to find appellant guilty upon representations made to persons not connected with the bank. The instruction must be read in connection with others following it, and we think it was made clear to the jury that they could

consider only representations made to the bank or its officials. That was the central idea repeatedly impressed upon the jury by subsequent instructions, and we do not think the somewhat inapt words of the single instruction misled the jury from the main thought couched in the charge as a whole.

It is insisted that in one instruction the court assumed certain facts to exist, viz., that appellant made certain statements about the certificate of deposit after he left the bank. The instruction was to the effect that such statements could not be considered as false pretenses for the purpose of defrauding Gower. The instruction was in the interest of appellant. Testimony of such statements was before the jury undisputed, and while even under those conditions the court should not have assumed and stated any fact as proven, yet we do not think the instruction did so. It merely stated the abstract proposition, "any statement made by the defendant," but did not say that such statement had in fact been made. Since there was evidence upon the subject, the instruction had no further effect than to call attention to the subject without saying what the evidence proved.

Other errors assigned upon instructions given, and upon the refusal to give requested instructions, we do not think it necessary to discuss. The charge of the court fairly and fully stated the law within our views of the case as heretofore outlined.

Finding no prejudicial error, the judgment is affirmed.

FULLERTON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

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Opinion Per DUNBAR, J.

[No. 4775. Decided December 5, 1903.]

J. A. GORE, *Respondent*, v. D. J. ALTICE *et al.*, *Appellants*.¹

38	285
39	458
33	335
34	600
33	335
42	563

FORCIBLE ENTRY AND DETAINER—COMPLAINT—SUFFICIENCY. Under Bal. Code, § 5526, a complaint in forcible entry and detainer is sufficient when it states that, while plaintiff was in actual possession of the premises, the defendants broke open the enclosures during plaintiff's absence, and by force and violence continue to occupy and refuse to surrender the same.

SAME—TITLE AND RIGHT OF PLAINTIFF—CLAIM OF RIGHT BY DEFENDANT. In an action of forcible entry and detainer, neither the title or rightfulness of plaintiff's possession, nor the good faith and claim of right of the defendants, are in issue, and evidence thereof is properly excluded.

Appeal from a judgment of the superior court for Kittitas county, Rudkin, J., entered January 27, 1903, upon the verdict of a jury rendered in favor of plaintiff. Affirmed.

Pryn & Slemmons, for appellants.

C. R. Hovey and *Graves & Englehart*, for respondent.

DUNBAR, J.—Plaintiff brought this action against the defendants for forcible detainer of certain lands in Kittitas county in this state. The cause was tried by a jury, and a verdict rendered in favor of the plaintiff. Judgment was entered and an appeal taken.

A demurrer was interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled. The overruling of the demurrer is assigned as error. The complaint alleges, in substance, that the plaintiff was in the actual and peaceable possession of the property in contro-

¹Reported in 74 Pac. 556.

versy, and that the defendants, during the absence of the plaintiff, entered upon said premises, broke open the enclosures maintained by plaintiff, broke open the door of the dwelling house, and entered therein; that they removed from said house the cooking stove and other personal property possessed by the plaintiff, and situated therein; and by force and violence continued to occupy and remain upon said premises, and refused to peaceably surrender the possession thereof to said plaintiff, after due notice given. Without entering into a discussion of the authorities, we are satisfied that this was a good complaint under the provisions of § 5526, Bal. Code, under which it was properly brought. That statute provides that

“Every person is guilty of a forcible detainer who either by force, or by menaces and threats of violence, unlawfully holds and keeps the possession of any real property, whether the same was acquired peaceably or otherwise; or who, in the night time, or during the absence of the occupant of any real property, [unlawfully] enters thereon, and who after demand made for the surrender thereof, refuses for the period of three days to surrender the same to such former occupant.”

The complaint states all that is necessary under the provisions of the statute.

Nor was there any prejudicial error committed by the court in rejecting defendants' Identification No. 1, which was entirely irrelevant to the issues involved in the case; nor in refusing to permit defendants to go into the question of plaintiff's right of possession, and in not requiring plaintiff to prove the right of possession; nor in excluding testimony of defendants to show that their entry was in good faith under claim of right. The forcible entry and detainer law has always been recognized, ever since its enactment, as a law in the interest of peace, or to prevent violations of the peace and acts of violence in contentions over

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the possession of real property. It is a provision for a speedy determination, not of any title to the real estate, or of the right of possession, but of the question of who was in actual possession, and if such actual possession was disturbed; and the only question is, was the occupant in the actual and peaceable possession of the property at the time the possession was wrested from him? The statute provides that the occupant of real property, within the meaning of the law, is one who, for five days next preceding such unlawful entry, was in the peaceable and undisturbed possession of such real property.

This question was discussed in California in the case of *Voil v. Hollis*, 60 Cal. 569. It is alleged by the appellants that the decision in that case was rendered upon an amendment to the statute which had not previously existed in California, and which was different from the statute of this state; but in this we think the appellants are mistaken. The court quotes the section under construction as follows:

"This we think is a proper construction of § 1172, Code Civ. Proc., on this subject, which applies alike to an action for a forcible entry, or for a forcible detainer, which section is as follows: 'On the trial of any proceeding for any forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry or was entitled to the possession at the time of the forcible detainer.'"

Our statute, § 5540, Bal. Code, provides that:

"On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to a forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry; or in addition to a forcible detainer complained of, that he was entitled to the possession at the time of the forcible detainer."

Thus it will be seen that the statutes are essentially similar, and the court in the California case said:

"We cannot see that good faith constitutes an element in a defense to a forcible entry or a forcible detainer under the provisions of the Code of Civil Procedure above referred to; nor that an entry made peaceably and in good faith cuts any figure in a defense to a forcible detainer. In either action the defense is limited as in § 1172, Code Civ. Proc., above cited."

A quotation is there made from *Mitchell v. Davis*, 23 Cal. 381, where it was said:

"If the defendant has any title or right of possession to the land, it must be tried in some action proper for trying such questions, but the present is not an action of that kind. He was not justified in attempting to enforce any such right by taking forcible possession of the land in dispute. He must first deliver up the possession thus forcibly acquired, and then he may be in a situation to litigate in a proper action any valid right or title he may have to the land. One great object of the forcible entry act is to prevent even rightful owners from taking the law into their own hands, and attempting to recover by violence what the remedial process of a court would give them in a peaceful mode."

And, again, quotes from *McCauley v. Weller*, 12 Cal. 500, where it was said:

"The action of forcible entry and detainer is a summary proceeding to recover possession of premises forcibly or unlawfully detained. The inquiry in such cases is confined to the actual, peaceable possession of the plaintiff, and the unlawful or forcible ouster or detention by defendant—the object of the law being to prevent the disturbance of the public peace, by the forcible assertion of a private right."

This is the uniform holding of the courts under statutes similar to ours. These questions are all involved in the

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Syllabus.

instruction given by the court to the jury in this case, which was a concise and correct presentation of the law. No error was committed by the court in any respect; the questions of fact were submitted to be passed upon by the jury, and the judgment will therefore be affirmed.

FULLERTON, C. J., and MOUNT, HADLEY, and ANDERS, JJ., concur.

[No. 4772. Decided December 5, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. JAMES
CHAMPOUX, *Appellant*.¹

HOMICIDE—MURDER IN THE FIRST DEGREE—INFORMATION—ALLEGING INTENT TO KILL—SUFFICIENCY. An information charging that the accused purposely and of his deliberate and premeditated malice, struck, cut, and mortally wounded the said B, from which said mortal wound said B died, sufficiently alleges an intent to kill, and supports a conviction of murder in the first degree; the intent to "mortally wound" importing *ex vi termini* an intent to kill.

SAME—ALLEGING DEATH FROM WOUNDS—TIME OF DEATH—SHOWN BY DATE OF FILING INFORMATION. An information for murder charging that the deceased then and there languished, and languishing, died, sufficiently shows that deceased died within a year and a day from the infliction of the wounds mentioned; and if not, the defect is cured by the fact that the information was filed three days after the crime was committed.

DEFENSE OF INSANITY—SPECIAL VERDICT OF SANITY—EVIDENCE—COMPETENCY. In a prosecution for murder where the sanity of the accused is made an issue by him, and an inquest held at his request before a special jury, during which the main trial is suspended, a verdict of sanity by such special jury and the record in such proceeding is properly admitted as competent, although not conclusive, evidence as to his sanity.

SAME—INSTRUCTIONS. In such case it is proper to refuse an instruction that such a verdict shall not have any bearing upon

¹Reported in 74 Pac. 557.

the sanity of the accused at the time of the commission of the offense.

CRIMINAL LAW—TRIAL—TAKING EXHIBITS TO THE JURY ROOM. Under Bal Code, § 5004, the records in an inquiry as to the accused's sanity, which has been received in evidence, may be taken to the jury room upon the jury's retiring for deliberation.

VENUE—MOTION FOR CHANGE—HEARING—ORAL TESTIMONY—DISCRETION. Upon a motion for a change of venue it is discretionary with the trial court to call witnesses to testify and it can not be said that refusal to do so is an abuse of discretion.

APPEAL—REVIEW—OBJECTIONS TO TESTIMONY. Error cannot be predicated upon rulings as to the evidence where the record shows that no objections were made below.

CRIMINAL LAW—WITNESSES—CREDIBILITY—FORMER CONVICTION OF FELONY. It is proper to ask a witness upon cross-examination whether he has ever been convicted of a felony, Bal. Code, § 5992, providing that such conviction may be shown to affect his credibility.

VENUE—CHANGE ON ACCOUNT OF PUBLIC SENTIMENT—SUFFICIENCY OF SHOWING. A motion for a change of venue because of the inflamed condition of the public mind, on account of many sensational crimes in a certain county, is properly denied when the general showing, if effective, would preclude the trial of all criminal cases in such county, and exhibited only the feeling ordinarily prevalent in a community where a heinous crime has been committed.

EVIDENCE—HEARSAY. The exclusion of immaterial and hearsay evidence is not error.

CRIMINAL LAW—TRIAL—REQUEST FOR WRITTEN INSTRUCTIONS. A request to instruct the jury in writing is complied with by reading from separate papers portions of instructions requested and marking the rejected portions with a lead pencil.

COURTS—JURISDICTION—REMOVAL OF CAUSES. A foreign subject accused of murder in the first degree committed within state jurisdiction is not entitled to a removal of the prosecution to the United States court.

EVIDENCE—LOST WRITING. Secondary evidence of the contents of written instruments is admissible when the instruments are lost.

JURORS—CHALLENGE FOR CAUSE—HOW WAIVED. Error in not sustaining challenges to jurors for cause is without prejudice

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Citations of Counsel.

when they were afterwards removed by peremptory challenges, or when the defendant proceeded to trial without removing such a juror or exhausting his peremptory challenges.

CONTINUANCE. The discretion of the trial court in refusing a continuance on account of the absence of witnesses not interfered with.

WITNESSES IN REBUTTAL—ENDORSEMENT OF NAMES ON INFORMATION. It is not error to allow witnesses to testify in rebuttal without endorsement of their names on the information.

Appeal from a judgment of the superior court for King county, Bell, J., entered June 6, 1903, after a trial and conviction of the crime of murder in the first degree. Affirmed.

A. J. Speckert, for appellant, contended, *inter alia*: The information is fatally defective in failing to allege a purpose to kill. *People v. Jacinto Aro*, 6 Cal. 208; *Leonard v. Territory*, 2 Wash. Ter. 381, 7 Pac. 872; *Blanton v. State*, 1 Wash. 265, 24 Pac. 439; *State v. So Ho Ge*, 1 Wash. 275, 24 Pac. 442; *State v. So Ho Me*, 1 Wash. 276, 24 Pac. 443; *Watson v. State*, 2 Wash. 504, 27 Pac. 226; *State v. Day*, 4 Wash. 104, 29 Pac. 984; *State v. Freidrich*, 4 Wash. 204, 29 Pac. 1055, 30 Pac. 328, 31 Pac. 332; *State v. Gile*, 8 Wash. 12, 35 Pac. 417; *State v. Smith*, 9 Wash. 341, 37 Pac. 491; *State v. Cronin*, 20 Wash. 512, 56 Pac. 26; *State v. Crawford*, 39 Kan. 257, 18 Pac. 184; *State v. McCormick*, 27 Iowa 402; *State v. Watkins*, 27 Iowa 415; *State v. Boyle*, 28 Iowa 522; *Shaffer v. State*, 22 Neb. 557, 35 N. W. 384, 3 Am. St. 274; *Kaelin v. Commonwealth*, 84 Ky. 354, 1 S. W. 594; *Fouts v. State*, 8 Ohio St. 98; *Kain v. State*, id. 306; *Hagan v. State*, 10 id. 459; *Bower v. State*, 5 Mo. 364, 32 Am. Dec. 325; *State v. Jones*, 20 Mo. 58; *Jewell v. Territory*, 4 Okl. 53, 43 Pac. 1075. The record of the insanity trial was not competent on the subsequent trial of the main charge. *Freeman v. People*, 4 Denio 9; *French v.*

State, 93 Wis. 325, 67 N. W. 706, 10 Am. Cr. Rep. 616; *Corbley v. Wilson*, 71 Ill. 211; *State v. Hopkins*, 13 Wash. 5, 42 Pac. 627. It was error to deny the application for a change of venue. *State v. Spotted Hawk*, 22 Mont. 33, 55 Pac. 1026; *State v. Olds*, 19 Ore. 397, 24 Pac. 394; *Carcia v. State*, 17 Crim. Law Mag. 17. The defendant being a foreign subject was entitled to a removal of the case to the United States court, under U. S. R. S., §§ 641 and 1977. *Strander v. West Virginia*, 100 U. S. 664; *Tennessee v. Davis*, 100 U. S. 648.

W. T. Scott, Elmer E. Todd, and Hermon W. Craven, for respondent, contended, among other things, that the information was sufficient. *Loeffner v. State*, 10 Ohio St. 598; *Territory v. Godas*, 8 Mont. 347, 21 Pac. 26. The intent to inflict a mortal wound is an intent to kill. *State v. Schaffer*, 22 Neb. 557, 35 N. W. 384; *People v. Davis*, 73 Cal. 355, 15 Pac. 8; *State v. Arnewine*, 126 Mo. 567, 29 S. W. 602; *Price v. State*, 35 Ohio St. 601; *State v. Smith*, 38 Kan. 194, 16 Pac. 254; *State v. Townsend*, 66 Iowa 741, 24 N. W. 535. The record in the insanity case was competent. *Wheeler v. State*, 34 Ohio 394; *People v. Farrell*, 31 Cal. 576; *State v. Reed*, 41 La. An. 581, 7 South. 132; 2 Phillips, Evidence, § 266; Greenleaf, Evidence (16th ed.), § 556.

DUNBAR, J.—Appellant was found guilty of murder in the first degree by the superior court of King county, and judgment was pronounced in accordance with the verdict. The charging part of the information on which the appellant was convicted is as follows:

“He, the said James Champoux, in King County, State of Washington, on the 5th day of November, 1902, unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, an assault did make in and upon the

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person of Lottie Brace with a deadly weapon, to wit: a knife then and there had and held in the hand of the said James Champoux, and with which he then and there unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, struck, cut and mortally wounded the said Lottie Brace from which said mortal wounding the said Lottie Brace then and there languished and languishing died."

It is sturdily contended, that this information will not sustain a conviction for murder in the first or second degree, or for any greater degree of crime than manslaughter, for the alleged reason that it fails to state an intention to kill; that, unless the intention exists and the killing actually takes place, there is no murder in either the first or second degree under our statute; and that it only charges the accused with an intention to commit an assault. *Leonard v. Territory*, 2 Wash. T. 381, 7 Pac. 872, and *Blanton v. State*, 1 Wash. 265, 24 Pac. 439, are relied upon in support of such contention. But whatever may be said of the merits of those decisions, both of which were rendered by a bare majority of the respective courts deciding them, it is not necessary in this case to either overrule or reaffirm the doctrine there announced, for the reason that the cases are plainly distinguishable, especially if this court should indulge in the nice distinctions made in those cases which resulted in the conclusion that intent to kill was not charged.

In the indictment in the Leonard case there was a great deal of involved verbiage, and the learned chief justice who wrote the opinion, after a somewhat technical analysis of the language used in the indictment, reached the conclusion that no intent to murder was charged in the main or charging part of the indictment, and that the concluding expression, "and so the jurors aforesaid do say . . . in

manner and form aforesaid, said Andrew Leonard, the said Ambrose Patton feloniously, purposely, and of his deliberate and premeditated malice, by means of said gun and the shooting aforesaid, did kill and murder aforesaid," etc., was not the charging of any fact, but was only the statement of an inference from the facts previously stated. In *Blanton v. State*, *supra*, the indictment was substantially the same as in *Leonard v. Territory*, and in both cases *Fouts v. State*, 8 Ohio St. 98, was cited by the court and relied upon in support of the decisions holding the indictment insufficient in the particulars mentioned. But that case, as we shall hereafter see, is not authority for holding the information in this case insufficient to sustain the judgment for murder.

We think, if the searching analysis employed by the court in the Leonard case had been brought to bear on an information like the one at bar, the court would have had no difficulty in discovering a charge of intent to murder. Certainly, an indictment charging that A unlawfully, feloniously, purposely, and of his deliberate and premeditated malice, mortally wounded B (with the other necessary averments as to time, place, and manner), charges an intent to murder; for it would be doing violence to the ordinary construction of language, and to common sense, to announce that one man could intend to mortally wound another without intending to kill him; and, if he intended to kill him unlawfully, feloniously, and with premeditated malice, it is evident that he intended to murder him. An analysis of this information shows that that is, in effect, what is charged; for, treating all the words between the word "malice" in the fourth line of the information and the word "struck" in the ninth line of the information as descriptive, we have the substance of the charge as follows:

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"He purposely and of his deliberate and premeditated malice struck, cut, and mortally wounded the said Lottie Brace, from which said mortal wound said Lottie Brace then and there languished, and languishing died." Or even commencing with the word "he" in the center of the seventh line of the information, the substance of the charge is as follows: "He then and there unlawfully, feloniously, and of his deliberate and premeditated malice, struck, cut, and mortally wounded the said Lottie Brace," etc. Either of these statements constitutes a good indictment so far as the question of intent to murder is concerned.

This conclusion is indorsed by the supreme court of the state of Ohio, which rendered the decision in *Fouts v. State*, *supra*, which is cited by all that line of cases holding bad such indictments as were passed upon in the Leonard and Blanton cases; for, at the same term of court in which the case of *Fouts v. State* was tried, viz., the December term, 1857, there was tried the case of *Leoffner v. State*, which was not reported until in 10 Ohio St. 598, where it was held that an averment that the accused purposely and of his deliberate and premeditated malice gave to H a mortal wound from which he instantly died, is sufficient, the intent to inflict a mortal wound importing *ex vi termini* an intent to kill. No mention was there made of the *Fouts* case, the court evidently concluding that the distinction between the two indictments was evident. So in this case, the intent to mortally wound being charged imports *ex vi termini* an intent to kill. See also *Territory v. Godas*, 8 Mont. 347, 21 Pac. 26, where an indictment identical with the one under consideration, so far as the question of intent is concerned, was held to charge an intent to kill.

The statute, it is true, provides that the indictment must be direct and certain as regards the party charged, the

crime charged, and the particular circumstances of the crime charged, when they are necessary to constitute a complete crime. But what is the reason for these cautionary provisions of the statute? The statute itself answers the query, viz., so that a person of common understanding may know what is intended; and the provisions just above quoted should be construed in reference to, and in connection with, subd. 6 of § 6850 [Bal. Code], which provides that the indictment is sufficient if the act or omission charged as a crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. All of the requirements summed up are for the purpose, and only for the purpose, of insuring to the accused the benefit of such provision, viz., that he shall know what is intended so that he may intelligently prepare his defense. This provision of the code is the all-important consideration, and all the other provisions enumerated are simply for the purpose of securing this one. This is the test of the fairness and efficiency of the information, as one of the prescribed processes in the administration of justice; and, subjected to this test, we think the information in this case is sufficient, and that the accused was notified that he was called upon to answer to the charge of murdering Lottie Brace.

In answer to the suggestion that it does not appear from the information that the deceased Lottie Brace died within a year and a day from the infliction of the wounds mentioned, we think the expression "then and there languished, and languishing died," relates back to the time the wounds were inflicted, and that the words "then and there" qualify the word "died" as well as the word "languished." But, in any event, the phraseology criticized is not material; for

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the information informs the accused that the mortal wounds from which Lottie Brace died were inflicted on the 5th day of November, 1902, and the information is dated on the 8th day of November, 1902, three days after. So that it must necessarily follow that the death occurred within three days from the infliction of the wounds. The information in all respects seems to be sufficient to sustain the judgment.

This disposes of the first, second, and sixth assignments of error. The third, fourth, and fifth relate to the action of the court in permitting the admission in testimony of the record of insanity, permitting such record to be taken into the jury room, and refusing instructions offered concerning such record. During the pendency of what may be termed the main trial, on application of appellant's attorney based upon affidavits that appellant was insane, the court ordered a special jury to try the question of insanity, the main trial being suspended pending such trial. The jury appointed to try appellant's sanity in due time returned a verdict of sanity; and the state was permitted, over the objection of appellant, to introduce the record of the insanity trial, which the appellant alleges was afterwards taken to the jury room with the jury.

The question of the appellant's insanity was a material issue in the case; a statement to that effect was made in the most emphatic terms by appellant's counsel, in his opening address to the jury; the testimony of various witnesses was offered to sustain the statement, and the inquest itself was petitioned for by appellant in that behalf. We think the testimony was properly admitted, as other testimony was admitted, bearing on the question of insanity—not as conclusive evidence, but simply as competent evidence, although some courts hold such testimony to be conclusive of insanity at the time the special verdict was rendered. Thus,

in *People v. Farrell*, 31 Cal. 576, the court held that the verdict of a jury called to try the question of the sanity of the defendant, the verdict being that he was insane, was conclusive that he was insane at the time the verdict was rendered, and was therefore admissible in evidence on his trial for the offense as tending to show that he may have been insane when the offense was committed. Of course the same reasoning would sustain the admission where the verdict was one of sanity. Under this authority, the following instruction asked by the counsel for appellant—"The court instructs you that the verdict of sanity returned by the jury is only presumptive evidence, but not conclusive, of the defendant's sanity upon the day when the said verdict was rendered, and said verdict shall not have any bearing upon the question of defendant's sanity or insanity at the time he was accused of assaulting Lottie Brace," was properly refused; for, while a portion of the instruction may have been correct, the latter portion, which was the most pertinent to the issues involved, did not state the law.

In *Wheeler v. State*, 34 Ohio St. 394, 32 Am. Rep. 372, where the defendant relied on insanity for a defense, and, as evidence tending to prove the defense, offered a record from the probate court showing that four years previous to the commission of the alleged crime an inquest had been held in that court, and that he had been adjudged insane and confined in an asylum, it was held that the evidence was admissible. The court there cited 2 Phillips on Evidence, 266, where it is said: "An inquisition of lunacy is evidence on the trial of an indictment to show that the prisoner was insane when he committed the offense;" also Sharswood's Starkie's Evidence, 407; Shelford on Lunatics, 74; and many other authorities, to sustain the decision. In that case it was held, that inquests of this character are

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analogous to proceedings *in rem* affecting the general and public interests, and no one can strictly be regarded as a stranger to them; and that the weight of such testimony is for the jury in each case. The whole record of the case was held admissible, the record consisting of affidavits, and the certificate of the physician setting forth the facts and giving a detailed statement of the case. We think both authority and reason sustain the admission of such testimony as throwing some light upon the issues involved, and to be weighed by the jury as any other pertinent evidence in the case.

Even if it appeared from the record that this insanity inquest proceeding was taken to the jury room, there is no prohibition thereof under § 5004, Bal. Code, cited and relied upon by appellant; which section provides that, upon retiring for deliberation, the jury may take with them the pleadings in the cause and all papers which have been received as evidence on the trial, except depositions, or copies of such parts of public records or private documents given in evidence as ought not, in the opinion of the court, to be taken from the person having them in possession. In fact, this section especially warrants the action complained of, unless such record can be construed to be a deposition, which we think it cannot be. The cases from this court cited by appellant, in our judgment, do not sustain his contention in this regard.

We are unable to discover any merit in appellant's assignments 8, 9 and 10. We cannot say that the court abused its discretion in refusing to direct the clerk to issue subpoenas to witnesses to testify on motion for a change of venue. Such matters are generally presented on affidavits, and the statute invoked by appellant relates to the trial of the cause. Some authorities, it is true, hold that

the court may in its discretion call and examine witnesses on these preliminary motions, but there is no authority making it its duty to do so.

Assignment No. 25 relates to the alleged error of the court in sustaining objections to certain questions asked witness McCartney, on cross-examination in relation to a former conviction for burglary. The record shows that the questions were asked and answered without objection. It is alleged in the same assignment that the court erred in not sustaining objections to the following question, propounded on cross-examination to appellant's witness, Paul Underwood: "Have you ever been convicted of a crime? Answer: Yes sir, of murder in the second degree. My case has been appealed and is pending in the supreme court." Appellant relies on the case of *State v. Payne*, 6 Wash. 563, 34 Pac. 317, but that case is not in point, as was shown by this court in *State v. Ripley*, 32 Wash. 182, 72 Pac. 1036, where it was held that it was proper on cross-examination to ask the witness whether he had ever been convicted of a felony. The statute, § 5992, Bal. Code, provides that no person offered as a witness shall be excluded from giving evidence by reason of conviction of crime, but that such conviction may be shown to affect his credibility. The question here asked was squarely under the provisions of the statute, and the answer showed that the conviction was for a felony and not for a misdemeanor, as in the case of *State v. Payne, supra*. No error was committed in overruling the objection to this question.

Assignment of error No. 8 relates to the alleged error of the court in refusing to sustain the motion asking for a change of venue. A discussion in detail of the evidence offered in support of this motion would not be profitable. We have, however, particularly examined the voluminous

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testimony and exhibits brought here by the appellant, tending to show that crime was rampant in the city of Seattle, and that the newspapers of that city were laden with sensational reports of sensational crimes committed both at home and abroad, to such an extent that, it is claimed, the public mind was inflamed to such a degree that one charged with a heinous crime could not obtain justice. But the general showing made here, if deemed effective, would preclude the trial of all criminal cases in King county, and the particular showing made in regard to the newspaper and other talk of the crime alleged to have been committed by this defendant exhibited only the feeling ordinarily prevalent in a community where a heinous crime of this kind has been committed. On an examination of the whole testimony adduced, we cannot say that the court abused its discretion in denying the motion for a change of venue.

No error was committed in sustaining objections to the questions asked Doctors Ross and Bories. The testimony elicited was either immaterial or purely hearsay.

The answer to appellant's complaint that the court refused to instruct the jury in writing, is that the court did so instruct. The statute does not require the instructions to be in any particular order or form, or to be necessarily engrossed on one paper. In this case the judge took the written instructions submitted by the state and those submitted by the appellant, giving such instructions from each as he thought properly stated the law, and marking those portions rejected with a lead pencil. The only object of the law in relation to written instructions must be to preserve the instructions actually given, so that they may be reviewed on appeal, and it is stipulated in this case that certain instructions were given and certain ones refused; so that, in any event, no prejudicial error was

committed, and we think there was a substantial compliance with the law.

No error was committed by the court in refusing to grant appellant's petition for a removal of his case to the United States court. The statute relied on, we think, has no application to this character of cases.

As to assignment 24, secondary evidence is always admissible to prove the contents of written instruments which are lost. The alleged error in not sustaining the challenges for cause to jurors Carr, Ziegler, and Wilson, if error at all, was without prejudice, as they were afterwards removed by peremptory challenges. *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216. And under the rule announced in *State v. Moody*, 7 Wash. 395, 35 Pac. 132, the error, if error it was, in not sustaining challenge for cause to the juror Brown, was not prejudicial for the reason that the defendant proceeded to trial without exhausting his peremptory challenges.

We are not disposed to interfere with the discretion exercised by the court in refusing to grant a continuance on account of the absence of the witnesses Relyea and Osman, which comprises appellant's eleventh assignment. Nor was there any error in allowing Doctors Loughrie, Willis, Ford, and Tripp to testify in rebuttal, although their names had not been indorsed on the information; nor in admitting the testimony of witness Ella Brace.

We believe the court properly instructed the jury on the law applicable to the case, and that the instructions asked by the defendant which embodied the law had all been given in another form by the court. Without further specialization, we are unable to find any prejudicial error in any respect.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, HADLEY, and ANDERS, JJ., concur.

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[No. 4649. Decided December 7, 1903.]

M. E. MESSENGER, *Respondent*, v. THOS. W. MURPHY,
et al., *Appellant*.¹

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ATTORNEY AND CLIENT—EMPLOYMENT BY ADVERSE PARTIES. An attorney should not be excluded from appearing in behalf of the plaintiff in an action for damages for the taking of exempt personal property under an attachment sued out by defendant, by reason of having previously represented the defendant, when it appears that he had simply been consulted as defendant's general counsel with reference to the collection of the original account, and was not employed in the attachment suit subsequently brought to collect it, and it does not appear that any facts were disclosed which he could use prejudicially to defendant's rights.

CONVERSION—WRONGFUL ATTACHMENT—SEIZURE OF EXEMPT PROPERTY—CLAIM OF EXEMPTIONS—SALE WITHOUT APPRAISEMENT. An execution plaintiff and the officer executing the writ, who ignore a claim for exemptions and proceed to sell without an appraisal, should respond in damages for the conversion of plaintiff's exempt property, seized and sold under an attachment issued on the theory that plaintiff was a nonresident; and a verdict for plaintiff will not be disturbed where there was sufficient evidence to justify the jury in finding that the plaintiff was a resident householder, that the property came within the classification of exempt property, and that claim to the exemption was duly made under Bal. Code, § 5255, prior to the sale.

DAMAGES FOR CONVERSION—VALUE OF GOODS—VERDICT WHEN NOT EXCESSIVE. A verdict for \$479.90 for damages for the wrongful attachment and sale of exempt property will not be disturbed as excessive when the evidence is conflicting and the plaintiff testifies that it was of that value.

SAME—GOODS PURCHASED ON THE INSTALMENT PLAN—MEASURE OF DAMAGES. The purchaser of goods on the instalment plan (the title remaining in the vender) may recover the full value for their conversion, when the contract contains an unqualified agreement to pay the price.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered January 21, 1903, upon

¹Reported in 74 Pac. 480.

a verdict of a jury rendered in favor of the plaintiff for \$479 damages for conversion. Affirmed.

J. C. Cross, for appellant. It was error to permit the attorney to represent an adverse interest after his previous employment. *Bowers v. Bowers*, 29 Gratt. (Va.) 697; *Weidekind v. Tuolumne County Water Co.*, 74 Cal. 386; 19 Pac. 173, 5 Am. St. 445. The judgment and sale in the attachment case was conclusive upon the defendant in a collateral proceeding as to the validity of the judgment, attachment, and sale. *Melhop v. Doane*, 31 Iowa 397, 7 Am. Rep. 147; *National Bank etc. v. Peters*, 51 Kan. 62, 32 Pac. 637; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. Ed. 931; *Brown v. Tucker*, 7 Colo. 30, 1 Pac. 221; *Anderson v. Goff*, 72 Cal. 65, 13 Pac. 73; 1 Am. St. 34.

Shields & Taggart (*John C. Hogan* of counsel), for respondent. To the point that an attorney may appear for a party in one transaction and against him in another, they cited: *Musselman v. Barker*, 26 Neb. 737, 42 N. W. 759; *Schall v. Bly*, 43 Mich. 401, 5 N. W. 651; *Price v. Grand Rapids etc. R. Co.*, 18 Ind. 137; *Beer v. Ward*, Jacob 77.

HADLEY, J.—This action was brought by respondent against appellants to recover the value of certain personal property, which, it is alleged, was wrongfully taken and converted by appellants. Other incidental damages are alleged, but at the trial the evidence was restricted to the value of the property. Appellants answered the complaint, setting up the record of certain justice court proceedings, by which the property in question had been attached, and afterwards sold under execution. The process in the justice court was by publication, and the proceedings were waged on the theory that respondent was at the time a non-resident of the state.

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Respondent replied and alleged, that she was, at the time of the justice court proceedings and sale thereunder, a resident householder of this state, at the city of Aberdeen; that she was the mother of three minor children dependent upon her for support; that the property converted by appellants consisted wholly of her wearing apparel, private library, family pictures and keepsakes, beds and bedding, not exceeding one for herself and for each member of her family, household goods, utensils, furniture, and fixtures, used, and then in use, by her in her place of residence in the said city of Aberdeen; that, after the seizure of the property and before the execution sale, she delivered to appellant Murphy, the officer holding the execution, an itemized list of all personal property owned by her, as required by § 5255, Bal. Code, which list included by separate items the property in question here, and all of which was by her then claimed as exempt; that the attaching creditor, appellant Becker, did not demand any appraisal of the property, and that appellant Murphy wholly disregarded said claim for exemption, and proceeded to sell the property nevertheless.

At the trial evidence was introduced to the effect that respondent was a resident householder, and that all the property came within the classification of exempt property. The jury returned a verdict for respondent in the sum of \$479.90; appellants' motion for new trial was denied; judgment was entered for the amount of the verdict; and this appeal is from the judgment.

It is assigned that the court erred in denying appellants' motion to exclude one of respondent's counsel from participating in the case. An affidavit was submitted in support of the motion, to the effect that John C. Hogan had been employed by appellant Becker as his general coun-

seller, and that, during such employment, he had advised with him in relation to the collection of the account upon which the justice suit was brought. The affidavit also states that said Hogan prepared certain papers looking to the enforcement of the account, but it neither states that they were papers connected with the suit that was brought in the justice court, nor that said Hogan was in any manner connected with that suit as attorney. It is not alleged that said appellant in any way acted upon the advice of said attorney in the proceedings which were pursued.

The pleadings disclose that J. C. Cross was said appellants' attorney of record in the justice proceedings, and we find nothing before us which shows that said Hogan participated therein, directly or indirectly, either as counsellor or otherwise. Any consultation that may have been had with Hogan related to the collection of a small grocery account of \$49.80, the amount for which the attachment suit was brought. But since it is not shown what, if any, facts were disclosed to him which could be used to the prejudice of appellant Becker in this case, we see no good reason for excluding him from participating in its trial. If it had appeared that Hogan was an attorney in the other case, and that it had been conducted in pursuance of his advice, then, doubtless, it would have been proper for the court to require him to withdraw from this one. Furthermore, if it had manifestly appeared that such facts had been disclosed to Hogan in his professional capacity as could now be used by him prejudicially to Becker's rights, even though he might not have been an attorney in the former suit, it is probable that sound legal ethics might have called for his withdrawal here. But that question we do not decide now, since such conditions are not shown by this record. It is true, appellants' counsel argues the

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question as if it were so shown, but, for reasons stated above, we do not think so, and we hold that the motion was properly denied.

It is next urged that the evidence was insufficient to justify any verdict against appellants. We think it was sufficient to sustain a verdict under the issues. We do not find it necessary to examine into the regularity of the justice court proceedings as to the insufficiency of process, which respondent contends made the attachment and judgment void. For the determination of the case, the questions of exemption and the amount of the verdict are the only ones necessary to examine.

We think the evidence clearly justified the jury in finding that respondent was at all the times involved a householder of the state, residing at Aberdeen, in Chehalis county, and also that all the property came within the classification of exempt property under the law. It also justified the finding that respondent made timely claim of her right to have the attached property set off as exempt. She duly made her claim by serving upon the officer a list of all her property, the attached property being substantially all, and claimed it as exempt. Both the officer and his coappellant ignored her claim, took none of the steps required in such a case, and proceeded to sell the property as the writ from the justice court directed. In *State ex rel. Hill v. Gardner*, 32 Wash. 550, 73 Pac. 690, this court held that the claim for exempt personal property may be made at any reasonable time before sale. The claim of respondent here was made July 19, prior even to the entry of judgment, which was August 13. The sale did not occur until August 30, following.

In the case cited, the remedy by mandamus was adopted for the return of the property, after the same course as

to claim of exemption had been pursued that respondent followed here. Respondent did not avail herself of that remedy, but she seasonably claimed her exemption, and the case cited is to the point that, since appellant Becker refused to comply with the statutory duty of demanding an appraisal, as provided by § 5255, Bal. Code, it became the duty of appellant Murphy to release the property. Exempt property is not subject to attachment, and no steps of any kind were taken by appellants to test the exemptible character of this property when it was claimed as such. Since the jury must have found it to have been exempt under the law, appellants should respond in damages for its conversion by seizure and sale.

It is next urged that the amount of the verdict is not sustained by the evidence. The evidence was very conflicting as to the value of the property converted. It is stated in appellants' brief that respondent herself really did not testify as to the value, but only said, "As listed it was \$479." The record discloses the following in her testimony:

"Q. What was the value of what was taken? A. \$479 and perhaps a few cents. Q. That included the piano, stool and cover? A. It did. Q. What was the value of those articles? A. The piano, which was as good as the day I bought it, was worth \$250. Q. What was the value of the property exclusive of the piano? A. About \$229."

Another witness testified that the property was worth from \$400 to \$500. The above testimony sustains the amount of the verdict, and we shall not disturb it for mere conflict of evidence.

It is further contended that the amount of the verdict is too great for the following reason. The piano had been purchased by respondent on an instalment contract. By the terms of the written contract, title was retained in the

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vendor until the price of \$250 was fully paid. Respondent had paid \$135 under the contract. Appellants claim that respondent's interest in the piano could not have exceeded the amount she had paid. By reference to the contract, we find that it contains an unqualified agreement upon respondent's part to pay the full sum with interest thereon. Such agreement is enforceable by the vendor, and respondent's interest in the piano, as far as third persons are concerned, therefore, extends to its full value.

We find no reversible error, and the judgment is affirmed.

FULLERTON, C. J., and DUNBAR, ANDERS, and MOUNT, JJ., concur.

[No. 4724. Decided December 8, 1903.]

M. C. STEEPLES, *Appellant*, v. PANEL AND FOLDING BOX COMPANY, *Respondent*.¹

APPEAL—REVIEW—HARMLESS ERROR. Error in striking evidence is harmless where a verdict must be directed in any event on account of plaintiff's contributory negligence.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—CROSS-EXAMINATION OF PLAINTIFF AS TO KNOWLEDGE OF DANGER. In an action for personal injuries received by falling from an unguarded platform, the plaintiff may be required on cross-examination to testify that he did not look to see if there were guards, as bearing upon the carefulness of his conduct.

NEGLECT—UNGUARDED PLATFORM—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—WHEN MATTER OF LAW—NONSUIT. A night watchman who falls from a second story eight foot platform assumes the risk from lack of a railing or is guilty of contributory negligence as a matter of law, where he had worked about the premises for two months, had been on the platform on two other occasions, and had worked thereon for two hours just previous to the accident, and after picking up a lantern fell in

¹Reported in 74 Pac. 475.

33	359
37	403
38	92
38	461
38	471
33	359
39	635

turning around without bringing the light to bear, it being a part of his duty to prepare all the light that was necessary.

SAME—LACK OF KNOWLEDGE—EVIDENCE. The testimony of the plaintiff that he did not know that there was no guardrail is of no avail where it was his duty to make an examination that would have informed him.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered November 6, 1902, upon the verdict of a jury rendered for the defendant by direction of the court at the close of plaintiff's case, dismissing an action for personal injuries sustained in falling from an unguarded second story platform. Affirmed.

W. H. Abel (*Govnor Teats*, of counsel), for appellant.
J. B. Bridges, for respondent.

DUNBAR, J.—Action for civil damages. The respondent, the Panel & Folding Box Company, was operating a mill or factory for the purpose of manufacturing boxes and other wooden commodities. The factory was in the second story. On the north side of the said second story there was a platform eight feet wide. The produce of the factory was loaded on to cars on the south side of the mill, the cars being on a level with the first story of the factory building; and the manner of loading was to carry the boxes or other produce of the factory on to the platform mentioned above, and slide them down a certain ladder, one end of which rested upon the cars, and the other, upon the platform leading from the door of the factory; and this was the mode of loading the car at the time of the accident.

The plaintiff was night watchman in the factory, but on this evening he had been requested by the superintendent to help load a car, and had done so. After having worked at loading this car for about two hours, his hat blew off. In a

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short time thereafter, he took a lantern, which hung just within the door that opened out on to the platform, with the intention of looking for his hat, and, turning around, fell off of the platform a distance of about ten feet, which fall caused the injuries for which he is seeking damages. On the east side of the platform there was an apron sloping off to the ground. On the west side, however, there was no railing of any kind to prevent any one from falling off, and it was from the west side of the platform that he fell.

At the close of plaintiff's testimony, a motion was made to instruct the jury to return a verdict for the defendant, which motion was sustained. Judgment was entered dismissing the action, and from that judgment, this appeal was taken.

With the view we take of the merits of the case, it is not necessary to discuss the second alleged error, viz., that it was error to strike the testimony of the witness Carr concerning previous injuries sustained by another person; because, if the testimony shows that the plaintiff was guilty of contributory negligence, as a matter of law, he could not recover under any circumstances. Nor do we think it was error to require the appellant to testify on cross-examination that he did not examine the platform, or look to see if there were guards or protection. We think this was a very pertinent inquiry, testing the carefulness of his conduct in that respect.

It will be conceded at the outset that it has been well established in this jurisdiction that the law requires the master to furnish a reasonably safe place for the servant to work in; so that it will not be necessary to discuss the cases cited to prove this proposition. It is also evident from the testimony that a reasonably safe place was not furnished for this servant to work in, and that the defendant was

guilty of negligence in that respect. But the pivotal question here is whether the danger was so apparent that the plaintiff assumed the risks of the employment, or whether he was guilty of contributory negligence.

We do not wish to depart from the rule uniformly maintained by this court and laid down in the early case of *McQuillan v. Seattle*, 10 Wash. 464, 38 Pac. 1119, 45 Am. St. 799, where it was said that the question of contributory negligence was for the jury to determine from all the facts and circumstances of the particular case, and that it was only in rare cases that the court was justified in withdrawing it from the jury; but the language of courts must always be interpreted with reference to the circumstances of the case under consideration, and the circumstances of that case were in nowise similar to those in the case at bar. In that case the plaintiff was injured by a defective sidewalk; he stepping upon a loose plank, which was lying partly across an open space about two feet wide, and the board tipping, causing plaintiff to fall through the sidewalk, a distance of eighteen or twenty feet. There being nothing in the circumstance showing conclusively that the danger was apparent, the nonsuit which had been granted was set aside.

In the case of *Morton v. Moran Bros. Co.*, 30 Wash. 362, 70 Pac. 968, cited and relied upon by appellant, the facts were again essentially different from those in the present case. That was where the plaintiff, who had never worked about ships, had been instructed by the foreman to take some pieces of boards down a certain ladder. At the bottom of the ladder, where the plaintiff had a right to presume that he would step on a solid floor, there was a hole instead of a floor, which he stepped into, and which this court held to be a hidden danger, and, under the circumstances of that case, in no way apparent to the plaintiff.

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It is contended by the appellant that this case is parallel with *Johnson v. Tacoma Mill Co.*, 22 Wash. 88, 60 Pac. 53, where a carpenter, who was employed to make repairs to a mill at a point where he was unfamiliar with existing conditions, and who was injured by stepping backward into a barrel of hot water, sunk so as to bring the top level with the ground, and which was used to receive the water and steam from the exhaust pipe of an engine in the mill—the presence of the barrel being unnoticeable by reason of the water in the barrel having pieces of bark floating on it, and by reason of no steam arising from the barrel at the time because the mill was not running—had a right of action against the mill company on the ground of its negligence in not furnishing him a safe place in which to work. In reviewing these conditions this court used the language attributed to it by appellant:

“ . . . and while it is true that the plaintiff in this case could doubtless have seen the barrel, if he had looked for it, . . . he was under no *obligation* to look for it, and naturally would not look for it, for he had no actual notice of its existence; and it does not appear that it was a necessary or common attachment to mills, or, if it was, that it was the custom to leave it uncovered. It was not a danger incident to the business of putting up a pipe, and under the testimony, it was not so conspicuous as to challenge attention; . . . ”

But entirely different are the circumstances in this case. The appellant had been working around this mill, off and on, for two months; the first month working at general work around the mill in the daytime for seven days, and as night watchman for five days, commencing work on the 26th of January, 1902. On the 26th of February, following, he commenced to work regularly as night watchman in the mill, and had worked about a month at the time the

accident happened. His business was, as he testifies, to take care of the second story, to light the lamps, and clean up the debris and litter around the building. This platform, which was only eight feet wide, and the edge of which on the west extended only three inches beyond the jamb of the door opening on to it, must have been noticeable to him every time the door was opened—and it was his duty, in his capacity as night watchman, to see that the doors were opened and closed, or at least to see that they were closed.

He testifies that on two other occasions before the night of the accident he had been on the platform, but had not paid any attention to it, and had not noticed whether there was any railing around the platform or not. On this particular night he had worked for two hours on this small platform in loading the car; his testimony being that he had placed one light in the car and the other back in the room, so that there was a dim light along the pathway which he traveled in carrying the boxes from the second story to the chute reaching down to the car, and that he had not noticed that night whether there was any railing on the platform or not. When he picked up the lantern to look for his hat, instead of using the lantern, he negligently moved without bringing the lantern to bear. There were other lanterns there, all under his supervision and care, and it was his duty to prepare all the light that was necessary for the work which was being done. Consequently he can not complain that his injury was caused by not properly lighting the platform. Unlike the case of *Johnson v. Mill Co. supra*—where a pitfall was dug in the level earth around which a man was working, and which was so hidden that it could not be discerned without specially looking for it—ordinary caution, it seems to us, would prompt a man, in working on a platform of this kind, to take some

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notice of his bearings. It is not uncommon for platforms of this kind around wharves, docks, and railroad depots, where freight is loaded, to be without guards; and the plaintiff, having been familiar with these premises for two months prior to this accident, under the circumstances shown by his own testimony, it seems to us, was guilty of the grossest negligence in walking around on the platform in the dark, and the peril was so apparent to a person of common understanding that he must be held to have assumed it when he went to work on the platform.

It is true the plaintiff testifies that he did not know that the platform was without a guard, but a plaintiff cannot recover simply by making a statement of that kind, if, under the circumstances, it was his duty, as a reasonably prudent man, to have made such an examination as would have resulted in the desired information. Yielding adherence to the statement often announced by this court, that, where the evidence shows that there could be any difference in the minds of reasonable men as to whether or not a plaintiff was guilty of contributory negligence, it is for the jury and not the court to enter into an investigation of, and decide, that question—we are of the opinion that the state of facts shown in this record precludes any such difference of opinion, and that it must be held that, as a matter of law, the plaintiff was guilty of contributory negligence.

The judgment of the lower court will therefore be affirmed.

FULLERTON, C. J., and MOUNT, HADLEY, and ANDERS, JJ., concur.

33	366
34	148
35	484

[No. 4738. Decided December 10, 1903.]

MARY E. CHURCH CULLEN, *Respondent*, v. ROBERT F.
WHITHAM *et al.*, *Appellants*.¹

APPEAL—REVIEW—FINDINGS ON CONFLICTING EVIDENCE. Where only the two parties testify directly to the facts, and their testimony is in conflict, without much support in the surrounding circumstances for either, the findings of the trial judge, who observed the witnesses, will not be disturbed.

INTEREST—PAYABLE ANNUALLY—NOT COMPOUND. A note providing for the payment of interest annually does not entitle the holder to compound interest or make the accumulated interest a separate debt.

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered December 4, 1902, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, decreeing the foreclosure of a mortgage. Modified.

G. L. Whitman and Troy & Falknor, for appellants.

J. W. Robinson, for respondent.

FULLERTON, C. J.—On February 1, 1896, the respondent, Cullen, loaned to the appellants, Whitham, one thousand dollars, taking their promissory note for that sum, payable in three years, with interest at ten per centum per annum, payable annually, together with a mortgage to secure the same upon a certain lot situated in the city of Olympia. This action is to recover upon the debt and foreclose the mortgage. The appellants filed an answer to the complaint, in which they admitted the execution of the note and mortgage, but denied the allegations of nonpayment, and by way of affirmative defense set up an accord and satisfac-

¹Reported in 74 Pac. 581.

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tion, namely: That the holder of the note, in consideration of the payment to her of certain rents due from a lessee of the mortgaged premises, and an conveyance to her of the premises, agreed to surrender to the appellants the promissory note, and cancel the mortgage debt. The answer was put in issue by a reply, and a trial had, resulting in a finding and judgment in favor of the holder of the mortgage.

The principal contention is over the question whether or not the plea of accord and satisfaction was made out. The respondent and the appellant Robert F. Whitham are the only witnesses who testify to the facts directly, and as we read the record their testimony on all of the main facts is in conflict. They agree that the appellants offered the respondent the mortgaged premises and the rents accrued thereon in satisfaction of the mortgage debt; and the appellant Whitham testifies that she accepted the offer by collecting and appropriating to her own use the rents; while the respondent testifies that she did not accept, but on the contrary positively refused to accept the offer, and collected the rents and applied them upon the mortgage debt under an express agreement made with the appellants authorizing her to do so. There is not much in the surrounding circumstances which supports or militates against the contention of either party, and nothing which seems at all convincing. In such a case, a chance to observe the demeanor of the witnesses is of all importance, and as the trial court had an opportunity to do this, which we have not had, its findings on the evidence will not be disturbed.

The remaining contention is that the loan is usurious and subject to the penalties provided by the statute relating to usury in force at the time of its execution. Session Laws, 1895, p. 349, §§ 2, 5. The court found that, inasmuch as the note provided for an annual payment of interest, the

holder was entitled to interest on overdue interest, finding that the amount due upon the note on November 4, 1902, was \$1854.70. But whether the note would have been usurious had it so provided, we have not found it necessary to determine, as we are clear that the court was in error in its construction of the terms of the note. To create an obligation to pay compound interest there must be an agreement to pay interest upon interest, otherwise there is no legal obligation on the part of the borrower to do so; it is not enough that the note provides for the annual payment of interest. To agree to pay interest annually does not make the accumulated interest a separate debt in the sense that it will draw interest per force of the statute without any further promise to pay interest thereon; on the contrary, there must be a direct promise to do so before such an obligation arises. The note in question contained no promise or agreement to pay interest upon overdue interest. It was, therefore, a simple interest bearing obligation, and the interest should have been calculated at the rate of ten per centum from date until the entry of judgment.

The judgment appealed from is reversed, and the cause remanded with instructions to enter a judgment for the amount of the principal with interest calculated upon the basis of simple interest at ten per centum per annum; neither party will recover costs in this court.

HADLEY, ANDERS, DUNBAR, and MOUNT, JJ., concur.

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Statement of Case.

[No. 4729. Decided December 10, 1903.]

S. NORMILE, *Appellant*, v. CITY OF BALLARD, *Respondent*.¹

MUNICIPAL CORPORATIONS—CONTRACTS FOR STREET IMPROVEMENTS—CONSTRUCTION—CITY ENGINEER—LIABILITY OF CITY FOR NEGLIGENCE OF AGENT. A contract between a city and two contractors whereby one was to pay the other for the removal of gravel from certain streets a specified sum per yard for "5000 cubic yards, more or less as may be designated by the city engineer," plainly refers to the amount and not to the location of the gravel, and a complaint for the unskilfulness of the city engineer in measuring said gravel, pursuant to such contract, relates to his official duties and sufficiently states the liability of the city for the negligent act of its agent.

SAME. A city is liable for the negligence and unskilfulness of its city engineer in estimating the amount of gravel moved by a contractor under a street grading contract, when thereby another contractor was, under the terms of a contract with the city, forced to pay a sum largely in excess of the amount due for such work.

SAME—CONTRACT OF CITY—CONSIDERATION—LIABILITY FOR NEGLIGENCE OF CITY ENGINEER. Where the city and two separate contractors on street improvements enter into a contract whereby one contractor is to pay the other 20 cents per cubic yard for all gravel placed in a certain street, the amount to be determined by the city engineer, and which contract was made for the purpose of enabling the contractors to complete their contracts, sufficient consideration on the part of the city, making it liable on the contract for the neglect of the city engineer, is shown by the fact that the value of removing the gravel was 35 cents per yard, 15 cents of which was to be paid by the city, and that thereby the city was relieved from the payment of 20 cents of such charge.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 7, 1903, upon sustaining a demurrer to the complaint, dismissing an action against a city for damages caused by the unskilfulness of the city engineer. Reversed.

¹Reported in 74 Pac. 566.

Bennett & Whitman, for appellant.

Tucker & Hyland, for respondent.

DUNBAR, J.—This action comes here upon the alleged error of the court in sustaining the demurrer to plaintiff's complaint. It will therefore be necessary to set out the complaint in full. It is as follows:

"1. That the said city of Ballard was, and at all times hereinafter mentioned, and now is, a municipal corporation, being a city of the third class, organized under and by virtue of the laws of the state of Washington.

"2. That during all the times hereinafter mentioned one H. T. Bostain was the duly appointed, qualified, and acting city engineer of said city, appointed by the city council of said city to hold office during the pleasure of the council, and as such was the servant or agent of said city.

"3. That about July 1, 1901, the said city awarded to plaintiff a contract to clear, grub, and grade First Avenue West in said city, furnishing an approximate estimate of 18,810 cubic yards of earth to be removed therefrom.

"4. That the said city of Ballard awarded to Walter Manney and Frank W. Frazier contracts to gravel Broadway and Second Avenue West in said city, with gravel to be taken from said First Avenue West, for which the said city agreed to pay the said Manney and Frazier 15 cents per cubic yard in addition to the amount paid by plaintiff. With that end in view all the parties, to-wit, S. Normile, Walter Manney, Frank W. Frazier, and the city of Ballard, joined in a written agreement whereby the gravel to be placed on Broadway and Second Avenue West was to be taken from First Avenue West, for which plaintiff agreed to pay the said Manney and Frazier 20 cents per cubic yard according to the estimate furnished by the said city engineer, a copy of said agreement is marked Exhibit 'A,' hereto attached, and made a part thereof; that under said contract the said Manney and Frazier removed

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3993.38 cubic yards of gravel from said First Avenue West, and no more.

"5. That the said city engineer, acting for and on behalf of said city, and in discharge of the duties of his said office, and not otherwise, furnished final estimates aggregating 7948 cubic yards of gravel removed by said Frazier and Manney from said First Avenue West, which is 3954.62 cubic yards in excess of the actual amount removed by them.

"6. That acting on the representations and final estimates of the said city engineer, and believing that they were true and correct, the said plaintiff paid to the said Manney and Frazier the sum of \$1,589.60, which is \$798.67 in excess of the amount earned by them under the terms of said contract.

"7. That said city engineer was unskilful, and said excessive payment was made by reason of the erroneous and excessive final estimates furnished by the said city, by its agent, said city engineer, by reason whereof said plaintiff has been damaged in the said sum of \$798.67, a claim for which was duly filed with, and disallowed by, the city council of said city.

"Wherefore plaintiff prays judgment against the said city of Ballard in the said sum of seven hundred and ninety-eight dollars and sixty-seven cents, with interest, together with costs of suit."

The Exhibit "A" referred to in the complaint is as follows:

"This agreement made and entered into between S. Normile, of Seattle, Wash., Walter Manney, of Ballard, Wash., Frank W. Frazier, of Ballard, Wash., and the City of Ballard, a municipal corporation of the third class: Witnesseth, that the said S. Normile, to whom was awarded the contract of improving a portion of First Avenue West, doth hereby agree with the said Walter Manney and Frank W. Frazier, to whom was awarded the graveling of Broadway and Second Avenue West, that he, the said S. Normile, will clear, grub, and remove all the surface dirt from said

First Avenue West, down to the gravel on or before the first day of August, 1901, and that said Normile will pay the said Walter Manney for the removal of two thousand cubic yards of gravel, more or less, as may be designated by the city engineer, for the improvement of Broadway, and for the removal of which said Normile shall pay the said Manney the sum of twenty cents per cubic yard, when the contract of the said Manney shall have been completed. And the said Normile shall pay the said Frank W. Frazier for the removal of three thousand cubic yards of gravel, more or less, as may be designated by the city engineer, the sum of twenty cents per cubic yard, as soon as the contract of said Frazier shall have been completed. It is understood that this agreement is made for the purpose of enabling the said Manney and said Frazier to comply with their respective contracts with the city of Ballard for the improvements of Second Avenue West and Broadway respectively, the gravel for which is to be taken from First Avenue West, from the contract awarded S. Normile; and for this reason, this contract shall be construed together with the respective contracts for street improvement between the parties to this agreement; and it is further agreed by all parties hereto that, if either of the parties to this agreement shall fail to complete their respective contracts in the time, and according to the specifications, for their respective street improvements so far as they relate to this contract, the city of Ballard may complete said contract for the same, pay for the same, and deduct the cost thereof from the contract price of the respective contractors. It is further agreed that the city of Ballard may require evidence to the effect that all labor and material had been fully paid for before the final estimate to the respective contractors herein has been made and paid for." (Signatures of the contractors and the city.)

The respondent contends that the city is not responsible for the wrongful act or neglect of its engineer, for the reason that the engineer is not the agent of the city in the per-

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formance of his duties, and cites § 974, 2 Dillon, Mun. Corp. (4th ed.), where it is said:

"It will be thus seen, on general principles, it is necessary, in order to make a municipal corporation impliedly liable on the maxim of *respondeat superior* for the wrongful act or neglect of an officer, that it be shown that the officer was *its* officer, either generally or as respects the particular wrong complained of; and also that the wrong was done by such officer while in the legitimate exercise of some duty of a corporate nature which was devolved on him by law or by the direction or authority of the corporation."

We think there is nothing in the technical objections to the complaint, raised by the respondent, and that it sufficiently states the liability of the city for the negligent or wrongful acts of its engineer in the performance of the duties of his office. The words in the contract, "as may be designated by the city engineer," when read in connection with the whole contract, plainly refer to the amount of gravel and not to its location.

It is also contended by the respondent, that the city is not responsible in any event; that the engineer is not the agent of the city in the performance of the duties of his office in relation to streets and highways; and *Alcorn v. Philadelphia*, 44 Pa. St. 348; *Kansas City v. Brady*, 52 Kan. 297, 34 Pac. 884; *Goddard v. Harpswell*, 84 Me. 499, 24 Atl. 958, 30 Am. St. 373; *Cavanagh v. Boston*, 139 Mass. 426, 1 N. E. 834, 52 Am. Rep. 700; and Dillon, Mun. Corp. (4th ed.), § 978, are authorities cited to support his contention.

Alcorn v. Philadelphia, supra, was decided on the theory that it was not a duty incumbent on cities, in their corporate capacity, to provide for the survey of lots, the location of lines, etc., but a private one, falling upon the lot

owners themselves, and if injury resulted from the negligence or unskillfulness in the surveyor employed, the employer must look to him for redress.

In *Kansas City v. Brady, supra*, it is held that a city is only liable for acts of its officers performed in the line of their duties; and the fact that a city engineer planned a defective drain, to be constructed by private parties, which caved in and caused injury, does not impose any liability on the city. In that case the city had constructed a brick culvert or sewer, and it was the construction of another waterway for private individuals which was planned by the city engineer that caused the damage to the plaintiff's property. The case, it seems to us, in no way sustains the respondent's contention, but, on the other hand, rather implies that, if the conditions had been as they are in this case, and the engineer had been acting in the line of his duty, the city would have been responsible.

Goddard v. Harpswell, supra, is a case where the county commissioner laid out a town road; within the limits of the road thus located the plaintiff had, prior to the location, placed a certain amount of stone, timber, and earth with the consent of the owners of the land, for the purpose of constructing a road and bridge upon the same line afterward located by the commissioners. After the location and establishment of the road by the commissioners, the stone, timber, and earth that plaintiff left within the limits of the location were used in such construction. The plaintiff, assuming that the taking and using of the material was by the direction of the town or by its authorized agents, brought an action of trover against the town for such conversion. The case was decided upon the theory that there was no evidence in the case that the town ever voted to open or build the road or bridge, or appropriated any money, or

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appointed any agents for that purpose, or gave any instructions to any officers, or in any way ever considered the question. "Nor," said the court, "is there any evidence that the municipal officers ever in any way took any direction or cognizance of the matter;" and the court decided that, in the absence of any evidence showing any action of the town or its municipal officers in the premises, it would not assume that such action had been taken. The case was decided upon that theory; and as showing that such was the theory upon which the case was decided, the court distinguished, *Hawks v. Charlemont*, 107 Mass. 414, where the town voted to take charge, and appointed its selectmen as agents with full discretion; *Deane v. Randolph*, 132 Mass. 475, where the town voted to put the selectmen in charge of the work; *Doherty v. Braintree*, 148 Mass. 495, 20 N. E. 106, where the town voted to take charge of the work and appointed a committee of five to act with the selectmen—which, it will be noted, are similar in their facts to the case under discussion, and which are cases sustaining appellant's contention—from the case then before the court.

It may be here said, too, that, if the decision of the court in that case had been put upon the ground claimed for it by respondent, it would have been in conflict with the decision of this court in *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576, 91 Am. St. 825, where we held the county liable for damages caused by the act of its officers in draining a lake for the construction of a county road in such a manner that it damaged the land of the plaintiff.

In *Cavanagh v. Boston*, *supra*, which was an action for injuries occasioned by the construction of a dam across South Bay, the case was decided against plaintiff squarely on the proposition that the improvement was *ultra vires*—that neither the board of health nor the city government

had any authority to abate the nuisance; the action being for damages in the erection of a dam for the purpose of abating a nuisance existing on adjacent land.

Snyder v. Lexington, 20 Ky. L. 1562, 49 S. W. 765, is a case where a mistake was made in the location of a line between the lot of the plaintiff and the street, and the plaintiff claimed damages by reason of having to remove the wall which he had erected on the proposed line. The court, however, in discussing it, said:

"The facts in this case show that the city replaced the sidewalk with a much better one than existed at the time the old one was torn up and the material carried away. Under such circumstances, it seems to us that the appellant has no cause to complain against the city. A concrete sidewalk was substituted for the brick one, which is more ornamental and quite as useful as the brick one."

In answer to the demand of the plaintiff that he should at least have damages for injury done to his fence, which the lower court had refused to allow him to prove, the court said:

"We do not think the court erred in this, because the engineer could not do anything which would deprive the city of its rights to one of its streets. If the city had brought an action against appellant in trespass, because he had placed his fence upon property belonging to the city, he might have pleaded the action of the engineer as a license to enter upon the city's property for the purpose of building the fence, and thus have avoided costs and damages."

So that it will be seen that, even in this case, the city was held liable to a certain extent for the mistake made in calculation by the city engineer.

It is, however, held in *Barney Dumping-Boat Co. v. Mayor*, 40 Fed. 50, that the commissioner of street cleaning

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of the city of New York is an agent of the city, and not an officer of the general public, notwithstanding his duties are rendered partly in the interest of the public health, and his powers are plenary, and, within their sphere, exclusive of the authority of any other officer of the city; that the city is therefore liable for his negligent acts done in the course of his official duties. And this is in harmony with the unanimous decisions of this court. While to a certain extent the construction and maintenance of sidewalks and streets are police regulations, as, in a sense, is almost every other duty imposed upon municipal officers, yet, in accordance with the great weight of opinion, we have uniformly held that cities are responsible for the negligent acts of their officers in constructing or maintaining streets and sidewalks.

In *Sheffield v. Harris*, 101 Ala. 564, 14 South. 357, it is held that a municipal corporation is bound by the acts of its agents or employees; and where one has served a municipal corporation in the capacity of superintendent of certain work carried on by said city, and the municipal authorities have accepted such service and received the benefit of his skill and labor, the municipal corporation cannot avoid its responsibility for injuries resulting from his negligence in the doing of work within the scope of the service he was rendering by denying the legality of his appointment.

In *Lee v. Sandy Hill*, 40 N. Y. 442, it was held that to render a municipal corporation liable for the tortious acts of its agents, it was enough that it should appear, either that they were expressly authorized by such corporation, or that they were done bona fide in pursuance of a general authority to act for the corporation on the subject in relation to which they were performed. In that case the charter of an incorporated village provided that its officers should be five trustees, and that such trustees should be commission-

ers of highways of the village, and have the same powers, and be subject to the same duties, as to the roads, streets and alleys of the village, as commissioners of highways in towns; and might lay out or alter any street or highway through, or upon, any garden, orchard, yard, or other lands in the village. Under a written resolution and order of such trustees, the overseer of highways wrongfully entered upon the land of the plaintiff, and moved back a fence erected by him in front of his lot; the trustees in making the order acting in good faith, erroneously supposing the plaintiff's fence was an encroachment upon the street, and that they were proceeding in pursuance of the power conferred upon them by the charter. Held, that the plaintiff could maintain trespass against the village for such removal, whether the trustees were to be regarded as mere agents of the corporation or whether it was the act of the corporation itself. These cases are in point in favor of appellant's contention.

But in addition to this, and outside of all discussion on the general proposition involved in the ordinary cases of neglect of corporate officers in enforcing police regulations, in this case the city, for its own benefit, entered into a civil contract with two separate contractors, viz., S. Normile, to whom was awarded a contract to improve First Avenue West, and Manney & Frazier, to whom was awarded the graveling of Broadway and Second Avenue West; and imposed upon appellant Normile the obligation to pay Manney & Frazier the amount of money which was estimated by the engineer to be due to said Manney & Frazier. The city had a vital interest in this contract, for the value of the placing of this gravel in Broadway and Second Avenue West was evidently 35 cents per cubic yard, and, by the payment of 20 cents of this value by the appellant, the city was relieved of so large a disbursement, and obtained the

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work done for 15 cents per cubic yard, payable on its part. So that it cannot be said that the contract was without consideration on the part of the city, for it was for the special benefit of the city that this contract was made. This is shown by the latter part of the agreement, viz:

"It is understood that this agreement is made for the purpose of enabling the said Manney and said Frazier to comply with their respective contracts with the city of Ballard for the improvements of Second Avenue West and Broadway respectively, the gravel for which is to be taken from First Avenue West from the contract awarded S. Normile; and, for this reason, this contract shall be construed together with the respective contracts for street improvement between the parties to this agreement."

The city, in said agreement, deemed it so essential to its interest that it incorporated a specific clause to the effect that it might require evidence to the effect that all labor and material had been fully paid for before the final estimate of the respective contractors had been made and paid for. So that, when the city engineer made the estimate of the amount which had to be paid under the contract by the appellant to Manney & Frazier, the payment of that amount had to be shown to the city before appellant could demand payment for the services performed by him. With such a contract between individuals no court would hesitate in holding all the parties responsible according to the terms of the contract. We see no reason why the city should escape because of its corporate capacity. The appellant performed his part of the contract, and the faithful performance of that part of the contract which was for the especial benefit of the city, through the negligence of the city engineer, was the cause of his loss. It was a loss in the interest of the city, and the city should be held responsible for the same.

The judgment is reversed, with instructions to overrule the demurrer to the complaint.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

38 380
36 596
33 380
42 443

[No. 4728. Decided December 10, 1903.]

THE STATE OF WASHINGTON, *on the Relation of C. B. Bussell, Plaintiff*, v. S. A. CALLVERT, *as Commissioner of Public Lands of the State of Washington, Defendant*.¹

PUBLIC LANDS—LEASE FROM STATE—FORFEITURE—POWER OF COMMISSIONER OF PUBLIC LANDS. A lease of tide lands made in accordance with the provision of Laws 1897, p. 253, as amended by Laws 1897, pp. 242-244, and Laws 1899, p. 139, can not be cancelled by the commissioner of public lands for any cause except nonpayment of rent, as authorized by § 25, Laws 1897, p. 244, and the commissioner's unauthorized cancellation of a lease is a mere nullity.

TIDE LANDS—STATE DEED TO THE UNITED STATES—USE FOR MAINTAINING FORTS—TITLE TO UPLAND NOT HELD BY THE GOVERNMENT. A deed of tide lands from the state to the United States, made under Laws 1890, p. 428, purporting to grant the use of such tide lands for the purpose of maintaining forts, etc., is invalid where such tide lands did not border upon upland held or reserved by the United States government for the purposes specified, as required by said act authorizing a deed from the state.

SAME—RIGHTS OF PRIOR LESSEE. Nor could such a deed abrogate the rights of a prior lessee of such tide lands, under a valid lease from the state, Laws 1897, p. 243, providing that lands held under lease shall not be offered for sale except to the lessee.

SAME—PURCHASE FROM STATE NOT AUTHORIZED BY CONSENT TO ACQUIRE TITLE FROM OTHERS. Laws 1890, p. 459, and Laws 1891, p. 31, granting the consent of the state to the purchase or condemnation by the United States, of lands owned by individuals or bodies politic or corporate within the state, in accordance with

¹Reported in 74 Pac. 573.

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Citations of Counsel.

United States constitution, Art. 1, § 8, clause 17, were not intended to authorize a purchase from the state, and the acceptance by the United States of a deed from the state is not authorized by said laws as a purchase from a body politic.

SAME—GRANT OF STATE LANDS FOR LAKE WASHINGTON SHIP CANAL—RIGHTS OF PRIOR LESSEES. Laws 1901, p. 7, granting to the United States the right to construct a ship canal connecting Lakes Union and Washington with Puget Sound through and over all state lands in King county, was not intended to annul existing leases of state tide lands made by the state to private parties, since such an attempt would be unconstitutional.

SAME. As such grant is general, it probably was not intended to convey the fee of leased lands, in view of Laws 1897 p. 243, prohibiting their sale.

SAME. Even if the fee was conveyed, it would be subject to the lease, and the commissioner of public lands could not exonerate himself from accepting rent by his arbitrary and illegal act of cancelling the lease.

MANDAMUS—COMPELLING COMMISSIONER OF PUBLIC LANDS TO RECOGNIZE VALID LEASE OF TIDE LANDS. Under Bal. Code, 5755, providing that a writ of mandamus may issue to any inferior tribunal, board or person, to compel the performance of a duty especially enjoined by law, or the admission of a party to the enjoyment of a right from which he is unlawfully precluded, mandamus is the proper remedy to compel the commissioner of public lands to accept rent due under a valid lease of tide lands which he has unlawfully cancelled and refuses to recognize.

Application to the supreme court for a writ of mandamus, filed June 12, 1903, to which the defendant demurred. Writ granted.

Peters & Powell, for relator, upon the right of the commissioner to cancel the relator's lease for the reasons assigned, cited: *United States, ex rel. McBride, v. Schurz*, 102 U. S. 378; *Bicknell v. Comstock*, 113 U. S. 149, 5 Sup. Ct. 399.

The Attorney General, and *C. C. Dalton* and *E. W. Ross*, for defendant. Individuals cannot maintain a proceeding to annul a patent. Washburn, Real Property,

pp. 209, 210 (5th ed.); 1 Dembetz, Land Titles, pp. 503, 514, 515; *McKinney v. Bode*, 33 Minn. 450, 23 N. W. 851; *Baker v. Newland*, 25 Kan. 25. Lands once sold are no longer subject to disposition, and the lease should not be reinstated while the United States holds the fee by grant. 1 Dembetz, Land Titles, p. 516; *State ex rel. Marsh v. State Board of Land Com'rs*, 7 Wyo. 478, 53 Pac. 292.

ANDERS, J.—This is an original application to this court for a writ of mandate commanding the defendant, as commissioner of public lands, to recognize the existence and validity of a lease of certain tide lands of the first class, executed in behalf of the state by the commissioner of public lands, and to accept from the relator the rent now due upon said lease, and the rent that may hereafter become due thereon, according to its terms, and to keep a record of all such payments, according to the statutes and the rules and regulations of his office.

The affidavit of the relator alleges:

“That on the first day of December, 1899, the state of Washington, by and through Robert Bridges, the then duly qualified and acting commissioner of public lands, duly issued according to law, to G. A. Wilson, then a citizen of the state of Washington, residing at Ballard, in King county, Washington, its lease of certain tide lands of the first class in front of the city of Ballard, King county, for the period of thirty years; that said lease was duly executed in duplicate by the said state and the said G. A. Wilson, as required by law, and the original thereof was, by the state of Washington, through the said commissioner Bridges, delivered to the said Wilson on the 1st day of December, 1899, and the duplicate thereof filed and kept in the office of the said commissioner; that a true copy of said lease is hereto attached, marked ‘Exhibit A,’ and made a part hereof; that said G. A. Wilson, on said 1st day of December, 1899, paid to the said commissioner the sum of \$113.42, for rent due upon said lease for the first year of

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the term thereof, according to its terms, and the said commissioner accepted said sum as and for such rent and credited the same upon said lease; that thereafter, on the 3d day of December, 1900, the said Wilson and his wife, for a valuable consideration to them in hand paid by the affiant, sold, transferred and assigned said lease in writing to this affiant; that on the 1st day of December, 1900, the said Wilson tendered to the said commissioner the sum of \$113.42, as rent for the second year of the term of said lease according to its terms, but the said commissioner refused to recognize said lease or the rights of said lessee; that on the 1st day of December of each and every year thereafter this affiant has tendered to the qualified and acting commissioner of public lands, for the time being, all rents then due and unpaid upon said lease, according to its terms, together with the additional sum of \$113.42 as and for rent for each ensuing year; that the defendant succeeded the said Bridges in the office of commissioner of public lands of the state of Washington, and is now such duly qualified commissioner; that the said Bridges, while still commissioner as aforesaid, refused to accept any rents, the payment of which was tendered as aforesaid, and refused to recognize said lease after the first day of December, 1900; and that the defendant, when he succeeded to the office of commissioner as aforesaid, also refused to accept any rents upon said lease, when tendered as aforesaid, and still so refuses; that at the time of the execution and issuance of said lease, all the tide lands described therein were subject to lease by the state of Washington, under the statutes thereof, and said lease was made and issued wholly in accordance with law; that on or about the 14th day of May, 1900, the said Bridges, then commissioner as aforesaid, attempted and pretended to cancel said lease, without the knowledge of, and without notice to, the said G. A. Wilson, or to this affiant; that at the time of the pretended cancellation the said lease was in good standing, and no rent was due and unpaid, and none of the covenants and conditions of said lease had been broken or violated by the lessee; that the said Bridges as commis-

sioner assumed and claimed the right to cancel said lease for the following reasons, and none other: that a portion of the tide lands covered by said lease was included within the lands which were then being sought to be appropriated by the county of King for a right of way for a canal, to be constructed by the United States government to connect the waters of Puget Sound and Lake Union in said county; that neither said Wilson nor this affiant was ever made a party to any condemnation proceedings brought by said King county, or by any other person, corporation, or body politic to condemn or appropriate any portion of said land, or any interest therein; and neither the said Wilson nor this affiant has ever been compensated in damages for the appropriation of any portion of said lands, or for any damages thereto, nor has any person, corporation, or body politic offered to compensate them therefor; nor have said lands, or any part thereof, ever at any time been taken or appropriated by the said King county, or by the United States government for any purpose whatever; that, at the time of the execution of said lease, and at the time of the pretended cancellation thereof by the said Bridges, no person, corporation, or government had any right, title, claim, interest, or demand in, to, or upon any of the tide lands covered by said lease, except the state of Washington and the said lessee."

A demurrer was interposed by the defendant to the foregoing affidavit of the relator, filed herein upon his application for a writ of mandate, on the ground that the same did not state facts sufficient to constitute a cause of action, or to warrant the granting of the relief prayed for, or any relief whatever. It was thereafter stipulated by and between the parties hereto that, upon the argument of this demurrer, the following facts should be considered as a part of, and incorporated in, the relator's affidavit, viz.: That on April 26, 1900, John R. Rogers, as governor of the state of Washington, and Will D. Jenkins, as secretary of state, made, executed, and delivered to the United States the deed

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(which is attached to the stipulation), as and for the deed of the state of Washington, and that a portion of the lands described therein is a portion of the lands covered by the original lease from the state of Washington attached to the affidavit of C. B. Bussell herein; that said deed was made without money consideration, and without public sale; and that no part of the tide lands covered by said lease, and no tract, piece, or parcel of land upon which any part of the same adjoins or borders has ever been, or is now, held or reserved by the government of the United States for the purpose of erecting or maintaining thereon any fort, arsenal, magazine, dock-yard, or other needful buildings.

The cause was heard upon the demurrer to the plaintiff's affidavit, as supplemented by the stipulation of the parties above set forth. It is insisted by the learned counsel for the defendant that the relator is not entitled to the relief demanded, or to any relief whatever, upon the facts stated in his affidavit, and admitted by the defendant's demurrer. It is conceded that the state, by its commissioner of public lands, was authorized to make the lease in controversy herein by § 50 of the act of March 16, 1897 (Laws 1897, p. 253), as amended by § 2, Laws 1899, p. 139, and by Laws 1897, pp. 242 to 244 inclusive; and it is admitted that the relator's lease was executed strictly in accordance with the provisions of the above mentioned statutes.

Section 25 of the act of March 16, 1897, *supra*, provides that the commissioner of public lands shall keep a full and complete record of all leases issued and payments made thereon, and shall declare a forfeiture of such lease for non-payment of the annual rent reserved, after sixty days' notice to the lessee. This is the only provision of the law, so far as we are advised, authorizing the forfeiture or cancellation of leases by the commissioner. And, as it is admitted that no

rent was due upon the lease at the time of the attempted forfeiture, it would seem logically to follow that the commissioner had no legal authority or power to cancel it, and that his declaration of forfeiture was without force or effect as to the rights of the relator. It cannot be presumed that the legislature intended to clothe the commissioner of public lands with power to annul leases formally executed by the state for any reason other than that specifically mentioned in the statute; and we are therefore of the opinion that the relator's lease is still a valid and subsisting contract with the state, notwithstanding the action of the commissioner regarding the same, unless the contentions of the defendant, hereinafter mentioned, are tenable.

By an act of the legislature approved March 20, 1890, the state granted to the United States the *use* of any tide lands belonging to the state and adjoining and bordering on any tract, piece, or parcel of land held or reserved by the government of the United States for the purpose of erecting and maintaining thereon forts, magazines, . . . and other needful buildings, so long as the upland adjoining such tide lands shall continue to be held by the government of the United States for any of the public purposes therein mentioned. This act also provides that, whenever the government of the United States shall cease to hold for public purposes any such tract, piece, or parcel of land, *the use of the tide lands bordering thereon* shall revert to the state of Washington. Laws 1890, p. 428.

It will be observed that this act simply granted to the government of the United States the *use* of tide lands belonging to the state, upon the conditions, and for the time therein specified. It does not seem to contemplate a conveyance of an estate in fee, but rather an easement of an indefinite duration. The governor and secretary of state, un-

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der and by virtue of the power supposed to have been thereby conferred upon them, executed the deed above mentioned, purporting to "give, grant, and convey" to the United States, for its own use and behoof, the parcels of tide lands thereon described, "to have and to hold, to the said United States, so long as the said United States, grantee herein, shall use the said described property for the purpose of erecting and maintaining forts, magazines, arsenals, dock-yards, and other needful buildings." This deed is upon the condition "that at any time when the government of the United States shall cease to use, for any of the public purposes hereinbefore enumerated, such tracts or parcels of land above described, then and thereupon, all the right, title, and use of the said tide lands above described shall immediately revert to, and vest in, the said state of Washington." This deed shows upon its face that it was executed under the act of March 20, 1890, *supra*, and that it authorizes the United States to hold, possess, and use the tide lands therein described only so long as the adjoining uplands shall be held by it for the purposes specified therein.

It is admitted upon the record that the tide lands in question did not adjoin or border on any lands held or reserved by the United States for any of the purposes mentioned in the act under which the deed was made; and it is therefore difficult to understand why it was deemed proper or necessary to execute that instrument. The government of the United States may never need the use of the lands covered by the deed, and until it does, it will have no occasion to question the right of the relator to hold possession of them. Whatever the effect of the deed may be as to the rights of the federal government, it is plain for obvious reasons that it did not, and could not, operate to abrogate the

relator's contract with the state, nor can we concede that it was the intention of the legislature, as expressed by this act of March 20, 1890, to grant to the United States the use of lands already in the possession and use of private persons under a valid lease, or to authorize the conveyance of such lands by the state's officers to the United States, to the injury of the lessee. That such was not the legislative intention is made plain by § 23 of the act of March 16, 1897 (Laws 1897, p. 243), which provides that "lands held under lease shall not be offered for sale or sold, except to the lessee, if the lessee shall keep his lease in good standing." It would seem from this provision of the statute that the deed under consideration was not authorized by law.

By an act approved January 23, 1890 (Laws 1889-90, p. 459), the state legislature granted permission to the government of the United States to purchase "any tract, piece, or parcel of land from any individual or individuals, bodies politic or corporate, within the jurisdiction of this state, for the purpose of erecting and maintaining thereon armories, . . . lighthouses, and other needful public buildings or establishments whatsoever." And a later act approved February 24, 1891 (Laws 1891, p. 31), granted to the United States the consent of the state to the "acquisition by purchase or by condemnation . . . of any tract, piece, or parcel of land, from any individual or individuals, bodies politic or corporate, within the boundaries or limits of this state, for the sites of locks, dams, piers, . . . and other necessary structures and purposes required in the improvement of the rivers and harbors of this state, or bordering thereon, or for the sites of forts, magazines, arsenals, . . . and other needful buildings authorized by any act of congress, . . ." It was also provided that all deeds or title papers for the same should be recorded upon the rec-

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ords of the county in which the land so acquired might be situated. In each of the two acts last above mentioned, it was provided that the consent thereby given was in accordance with the seventeenth clause of the eighth section of the first article of the constitution of the United States, and with the acts of congress "in such cases made and provided."

It is contended on behalf of the defendant, that the several legislative acts hereinbefore mentioned and the deed from the state conveyed the fee to the United States; that the several acts referred to, and particularly the act of 1891, were broad enough to grant to the federal government a right of way for a canal and all other improvements incidental thereto; that the authorization contained in the act of January 23, 1890, and especially of the act of February 24, 1891, to purchase from bodies politic or corporate, is broad enough to authorize a purchase from the state; that these several laws and grants fully authorized and empowered the officers of the state to execute and deliver, to the federal government the deed; that the acceptance of the deed by the federal government amounted to a purchase from a body politic or corporate of the lands described therein, within the meaning of the several acts above referred to; that the commissioner having authority to cancel leases, his cancellation of the lease in question inured to the benefit of the United States; that the interests forfeited reverted to the owner of the fee, and that whether the lease was rightfully or wrongfully cancelled, it cannot be reinstated, for the reason that the commissioner of public lands has no further control of the lands in controversy.

We have already expressed our views as to the meaning and effect of the act of March 20, 1890, and it is not necessary to repeat them; and as to the other acts mentioned we

will simply observe that, in our judgment, they are not justly susceptible of the comprehensive construction suggested by counsel for the defendant. Such construction is not fairly deducible either from the language used by the legislature or from the object or purpose of the respective acts. We do not think that it can reasonably be said that, when the legislature granted to the United States the *consent* of the state to acquire, by purchase or by condemnation, land from individuals or bodies politic, *within this state*, for specified purposes, they intended thereby to *grant* consent to purchase lands *from the state*. If such was their intention, we think they would have expressed it in plain and unequivocal language.

It is also contended on the part of the defendant that, even if the deed from the state was not warranted by the acts above referred to, the title to the lands therein described, as accepted for canal purposes, nevertheless passed to the United States, unincumbered by the lease of the relocator, by virtue of the act of February 8, 1901 (Laws 1901, p. 7). That act granted to the United States the right to place, construct, maintain, and operate a ship canal . . . upon, along, through, and over any and all lands belonging to, and waters of, this state, in King county, for the purpose of connecting the waters of Lakes Union and Washington with Puget Sound. That act was passed long after the date of the execution of the deed in question, and presumably because the legislature thought the state was then the owner of the lands over which the canal therein mentioned might or would be constructed. It can hardly be construed as an attempt by the legislature to annul existing leases by the state to private parties. If that was its object, the act would have to be declared unconstitutional and void. The only possible effect of that act was to grant to the United

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States whatever title the state had to the lands intended to be thus granted. But, as the grant was general in its nature, it may well be doubted that the legislature thereby intended to convey to the government lands which they, by the act of March 16, 1897, prohibited the state from selling or offering to sell, except to lessees, who have kept their leases in good standing.

But, conceding that the fee passed from the state to the United States by virtue of this grant, we do not think it necessarily follows, as the defendant seems to contend, that whatever rights the relator had in the premises were thereby extinguished. We have hereinbefore endeavored to show that the deed by the state officers was executed, and relator's lease cancelled, without authority of law. And if this conclusion is correct, the attempted cancellation of the lease by the then commissioner was a mere nullity, and the lease is still, as we have already intimated, a valid and subsisting contract, and should be so recognized by the defendant. It is conceded that it is the duty of the commissioner of public lands to receive the rent due and payable on leases of land made by the state, if tendered at the proper time; and we do not think that he can exonerate himself from such duty by his own arbitrary and illegal act. Private property can not be taken in this state, even for public purposes, "without just compensation having been first made or paid into court for the owner. Const. Art. 1, § 16. Nor can it be arbitrarily confiscated either by the state or its officers.

We do not deem it necessary in this case to consider the question of the effect of a patent or a grant by the government as evidence of title, or of that of the proper procedure by which the same may be set aside, as we think these questions are not necessarily involved in the cause. Our statute provides that a writ of mandate may be issued by any court,

except a justice's or police court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station, or to compel the *admission* of a party to the *use and enjoyment* of a right to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person. Bal. Code, § 5755. In view of this statute, it would appear that the relator is pursuing the proper remedy in this instance. And, as we are satisfied that the relator's affidavit states facts sufficient to entitle him to the relief demanded, the defendant's demurrer must be overruled, and it is so ordered. And as the defendant declines to plead further, it is ordered that the writ prayed for be issued.

FULLERTON, C. J., and DUNBAR, HADLEY, and MOUNT, JJ., concur.

[No. 4830. Decided December 10, 1903.]

GEORGE E. SIMPSON, *Appellant*, v. CITY OF WHATCOM,
Respondent.¹

MUNICIPAL CORPORATIONS—ENFORCING VOID ORDINANCE—LIABILITY FOR ACTS OF POLICE OFFICERS—CITY AS STATE INSTRUMENTALITY—DAMAGES FOR UNAUTHORIZED ARREST. A municipal corporation is not liable for the acts of its police officers in arresting and prosecuting a person under a void ordinance requiring bicycles to be licensed, although the city receives the benefit of the license fee and its law officers conducted the prosecution, since the damage arises in the performance of a duty imposed upon the city as a public instrumentality of the state.

SAME—FEES COLLECTED FOR THE BENEFIT OF CITY. The fact that the city received the benefit of the license fees does not make the duty a purely corporate one, as the legislature may distribute

¹Reported in 74 Pac. 577.

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the revenue therefrom as it sees fit, and the city is liable only where the officers are acting for the city's exclusive benefit.

SAME—POLICE POWERS—BICYCLES. Bicycles are vehicles and their use upon the public streets of a city is a proper subject for police regulation in the interests of public safety, to be enforced by the city acting as an instrumentality of the state.

Appeal from a judgment of the superior court for Whatcom county, Joiner, J., entered February 24, 1903, upon sustaining a demurrer to the complaint, dismissing an action for damages for plaintiff's arrest and prosecution under a void city ordinance. Affirmed.

Stafford & Ellis (Marshall P. Stafford, of counsel), for appellant. The complaint alleges that the officers acted for the city's exclusive benefit, and for all such acts the city is liable. *McGraw v. Marion*, 98 Ky. 673, 34 S. W. 18, 47 L. R. A. 593; *Providence v. Clapp*, 17 How. 161; *Maximilian v. Mayor*, 62 N. Y. 160; *Woodhull v. New York*, 150 N. Y. 450, 44 N. E. 1038; *Stewart v. New Orleans*, 9 La. An. 461; *Carrington v. St. Louis*, 89 Mo. 208, 1 S. W. 240. The city was liable by reason of the adoption and ratification of the acts. 2 Dillon, *Munic. Corp.*, § 971 (4th ed.); *Commercial El. L. & P. Co. v. Tacoma*, 20 Wash. 288, 55 Pac. 219; *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576. The city is not relieved by the fact that the torts befall in its exercise of police power. *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Saylor v. Montesano*, 11 Wash. 328, 39 Pac. 653; *Taake v. Seattle*, 16 Wash. 90, 47 Pac. 220.

H. M. White, for respondent.

DUNBAR, J.—Respondent passed a municipal ordinance prohibiting the riding of bicycles of a certain size upon its streets unless a license therefor were procured and a tax of one dollar a year paid for such license. The ordinance pro-

vided that seventy-five per cent of the revenue derived from such license should be expended on certain local improvements within respondent's municipal limits, and that the remaining twenty-five per cent was to be, and it was, mingled with, and made a part of, the general funds of the city for use in its local interests, benefits, and advantages.

On the 15th day of August, 1900, one Shelley, a policeman of respondent city, made and swore to an affidavit before a police justice of the respondent, charging appellant with the violation of said ordinance by riding a bicycle on the public streets without having procured a license therefor. A warrant was issued, the said policeman arrested the plaintiff, imprisoned him for several hours, and caused him to be arraigned before a police justice on said charge. Appellant was prosecuted by the city attorney, and convicted and fined, and a judgment for such fine and costs, amounting to \$13.70, was entered against him in the police court of said city. In order to release himself from said conviction and judgment, appellant was compelled to, and did, appeal therefrom to the superior court of the state of Washington, giving bond in the sum of \$100 to perfect such appeal. Upon said appeal the ordinance was held by the judge of the superior court to be null and void in so far as it purported to prohibit the riding of bicycles upon the public streets of respondent without a license, and appellant was acquitted of such charge. In defending himself from such charge, conviction, and judgment, appellant was compelled to employ attorneys at an expense of \$50.

Afterwards appellant brought an action for damages against the city, alleging in his complaint the matters and things just above stated, in addition to the allegation that, by reason of such charge, arrest, and trial, appellant lost time to the value of \$15, and was injured in his feelings

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and subjected to humiliation and disgrace and caused mental pain and anxiety to his damage in the sum of \$2,500, asking judgment for \$2,565. To this complaint, the substance of which we have given, the respondent city demurred. The demurrer was sustained, and, appellant refusing to plead further, judgment was entered in favor of respondent.

The issues arise on the ruling of the court in sustaining the demurrer to the complaint. The exact question involved in this case has not heretofore been presented to this court, and we have therefore made an exhaustive examination of the authorities bearing on the question. It must be confessed that they are somewhat bewildering, as well in number as in lack of harmony, viewed either from the standpoint of different conclusions from the same state of facts, or of the announcement of different principles controlling the same conclusions. So that it is not easy to reconcile all of the decisions and deduce therefrom a satisfactory general principle, by subjection to which the different facts can be tested.

The controlling question in all this character of cases is whether or not the officers, to whom are attributed the delinquencies which resulted in the damage alleged, are the agents of the city. If they are, then the doctrine of *respondet superior* applies, and the city is liable; if not, otherwise. We think it is a general rule—at least one which has been adopted by this court—that, even in the absence of a statute giving the right of action, cities are liable for acts of misfeasance and malfeasance injurious to individuals, done by their authorized agents or officers in the course of the performance of corporate powers, or in the execution of corporate duties. But this raises the perplexing distinction between corporate duties and public duties—questions as

to when the officers are acting as agents for the corporation, and when of the state or general public. When for the general public, or in furtherance of the public policy of the state, the city is not liable for their acts. In some jurisdictions, as in Massachusetts, it is held that, even when the officers are acting confessedly in the interests of the city, no private actions for damages will lie unless specially authorized by statute. But it is unnecessary to discuss that line of cases, as this court in *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, has laid down the contrary rule, which it has since uniformly followed.

We think, however, this general deduction may be made: that whenever the damaging action or the neglect of the officer arises in the execution of a duty which is for the exclusive benefit of the city, the city is liable; but if the duty, in whole or in part, is one imposed upon the city as a public instrumentality of the state, the city is not liable. It is insisted by the learned counsel for the appellant that, inasmuch as the complaint shows that the ordinance provides that the revenues arising from the licenses sought to be secured shall go into the city treasury, the city is liable, under the rule announced in *Dillon on Municipal Corporations* (4th ed.), § 974; that, if the duties relate to the exercise of corporate powers and are for the peculiar benefit of the corporation in its local or special interest, they (the officers) may be regarded as its agents or servants, and the maxim of *respondet superior* applies.

But it does not necessarily follow that the duty is purely a corporate one because the revenues arising from the provisions of the law go into the treasury of the municipality. It is in the nature of a police regulation, a regulation which the legislature had a right to make; the legislature had a right, also, to distribute the powers of the government in

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the enforcement of its public policy, to constitute the different municipalities enforcing agencies, and to distribute the revenues as it saw fit. It would certainly not be an unreasonable act on the part of the legislature to place the revenues arising from the law in the treasury of the municipality collecting them. And it cannot be disputed that the state, under its police power, has the right, in the absence of constitutional limitations or inhibition, to subject all occupations to a reasonable regulation where such regulation is required for the public welfare. The bicycle is a comparatively modern invention, and legislation in regard to it has been limited. Still it has been established by judicial decision that, so far as its use on the highways is concerned, it is to be regarded as a carriage or vehicle and subject to the same burdens as other vehicles. 4 Enc. of Law (2d ed.), p. 16, and cases cited. The use of vehicles on public highways is a subject of police regulation. 22 Am. & Eng. Enc. Law (2d ed.), 929.

In any event, common observation would determine the fact that the bicycle, with its capacity for extreme speed, its liability on that account to injure pedestrians who might come in contact with it, as well as the riders themselves, is a particularly suggestive subject for public legislation; and the legislature of this state, recognizing such necessity, passed a law found in the laws of 1899 at page 41, authorizing and empowering cities of the first, second, third, and fourth classes to regulate and license by ordinance the riding of bicycles, to construct and regulate the use of bicycle paths and roadways, prohibiting the improper use of such paths and roadways, and providing a penalty and declaring an emergency. This law authorizes the cities to establish and collect reasonable license fees from all persons riding bicycles, and to enforce the payment thereof by reasonable

finest and penalties, and make provision for the distribution of the funds arising from such licenses. So that it will be seen that the ordinance was enacted in conformity with the express policy of the legislature in relation to controlling bicycles.

Nor could Mr. Dillon, in the quotation relied upon by appellant, have had in view the kind of case under discussion here; for, after a discussion of the general principles relating to the liability of towns for the action of its officers, he continues, in § 975, as follows:

"Agreeably to the principles just mentioned, *police officers appointed by a city are not its agents or servants, so as to render it responsible for their unlawful or negligent acts in the discharge of their duties; and, accordingly, a city is not liable for an assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city; or for an arrest made by them which is illegal for want of a warrant, or for other cause; . . . So, on the same principle, a person who suffers personal injury while aiding the police officers of a city, at their request, in arresting disturbers of the public peace under a valid ordinance, has no remedy against the city. The municipal corporation in all these and the like cases represents the state or the public; the police officers are not the servants of the corporation; the principle of respondeat superior does not apply, and the corporation is not liable unless by virtue of a statute expressly creating the liability.*"

While the case of *McGraw v. Marion*, 98 Ky. 673, 34 S. W. 18, 47 L. R. A. 593, seems to lay down a different doctrine, holding that a municipal corporation is answerable for the damage done to any person by its officers in enforcing an unconstitutional ordinance or by-law enacted for the sole benefit of the corporation or its citizens—the ordinance in question being one requiring all transient persons to pay a license tax for the privilege of

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selling goods or merchandise of any kind at auction—and while a few cases have followed the doctrine announced in that case, yet the same court in *Taylor v. Owensboro*, 98 Ky. 271, 32 S. W. 948, 56 Am. St. 361, held that a municipal corporation was not liable for the acts of its officers in enforcing the penal or criminal laws of the commonwealth, or in enforcing penal ordinances of the city; and that municipal officers, while engaged in duties relating to the public safety and in the maintenance of public order, are the servants of the commonwealth. So that the court in the case of *McGraw v. Marion*, *supra*, must evidently have concluded that the imposition of a license tax on transient persons was not in accordance with any provision of the general law, but for the sole and special benefit of the city. The difficulty in discriminating the cases on any reasonable theory, however, arises from the fact that the court in the case of *Taylor v. Owensboro*, *supra*, states that while the ordinance under which the arrest purported to be made was void, the arrest was held to be authorized by a state statute; but says that the absence of the statute would have made no difference, for the reason that municipal corporations are auxiliaries of the state government; that the officers charged with keeping the peace are officers of the commonwealth, and a breach of the peace is an offense against the commonwealth, so that a municipal corporation is not liable for the acts of its officers in making a reasonable arrest for such breach. But whether or not there was any legitimate distinction that could have been drawn between the cases, both of them arising out of the police power of the state, it seems to us that the great weight of authority supports the first announcement of the Kentucky court as made in *Taylor v. Owensboro*, *supra*.

While there are some courts which follow the rule an-

nounced in *McGraw v. Marion*, no court that we know of has held the municipality liable in a case exactly like the one at bar, where the question came up squarely as to whether or not a policeman, in making an arrest under an illegal ordinance or warrant, was the agent of the city. There are many cases directly to the contrary, and sustaining the doctrine announced by § 975 of Dillon, *supra*.

In *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1, a case of enforcing illegal ordinances, it was held that, for acts done by police officers in their public capacity and in discharge of their duties to the public, cities and towns incurred no liability to persons who may be injured by them; that neither for the act of the council in passing an illegal ordinance, nor for that of the mayor in issuing a warrant for the arrest of any person for its violation, nor for that of the marshal in arresting the offender under it, is a town liable to him. In *Tindley v. Salem*, 137 Mass. 171, 50 Am. Rep. 289, it was held that a city which undertakes the celebration of a holiday under the authority of the public statutes, exclusively for the gratuitous amusement of the public, is not liable to an action by one who sustains personal injuries through the negligence of servants of the city in discharging fireworks for the purpose of the celebration. After discussing a certain class of cases where the city was liable for the action of its servants, the court says:

"Easily distinguishable from these are the cases where the city or town is exonerated from liability, on the ground that the wrongful act complained of is not its act, but the act of persons who are deemed to be public officers, existing under independent provisions of the law; officers who, though appointed and paid by the city or town, and though perhaps its agents or servants for other purposes, are yet held not to sustain this relation in respect to the par-

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ticular act in question—as, for example, members of a fire department.”

It may be said here that this court held in *Lawson v. Seattle*, 6 Wash. 184, 33 Pac. 347, that the city was not liable for the negligence of officers of a fire department. In *Worley v. Columbia*, 88 Mo. 106, it was held that police officers of a town, engaged in enforcing its police regulations, are not regarded as officers of the town, in its corporate capacity, and the town is not liable for acts done by them while so engaged. This was an action for false imprisonment, and in its facts was parallel in principle with the case at bar. The court, in discussing the action of the officers in enforcing the police regulation, said:

“When so acting their duties are of a public character; their acts are in the interest of civil government and of the public, and they are not, when acting in that behalf, the servants of the town or city, in its corporate capacity. The relations of principal and agent do not then exist, and the town is not liable for their said acts in that behalf.”

In *Nisbet v. Atlanta*, 97 Ga. 650, 25 S. E. 173, where the death of one convicted in a corporation court, and sentenced to work upon the public streets, was occasioned by the negligence on the part of the foreman who had been placed by the municipal authorities in charge thereof, the court said:

“The question involved in this case has been too often passed upon by this court to require further elaboration. Neither the law of master and servant nor the doctrine of *respondet superior* applies in a case where a prisoner undergoing punishment for the violation of a municipal ordinance is injured or killed in consequence of the negligence or misconduct of the officer having the custody or control of such prisoner. This is true because, in such matters, the municipal corporation is exercising governmental powers and discharging governmental duties, in

the course of which it, of necessity, employs the services of the officer in question."

citing *Wilson v. Mayor*, 88 Ga. 455, 14 S. E. 710; and *Love v. Atlanta*, 95 Ga. 129, 22 S. E. 29, 51 Am. St. 64.

In *Bartlett v. Columbus*, 101 Ga. 300, 28 S. E. 599, 44 L. R. A. 795, it was held that a municipal corporation is not liable in an action for false imprisonment for damages alleged to have been occasioned to the plaintiff by reason of his imprisonment under a judgment rendered against him by a municipal court for the violation of an ordinance, and that this was true though such judgment may have been irregular, erroneous, or even void.

"The passage of the ordinance," said the court, "by the city council of Columbus, for the alleged violation of which the plaintiff in error was tried, convicted, and imprisoned, was an exercise of the legislative power, and his trial and sentence by the recorder was an exercise of the judicial power conferred by the state upon the municipal corporation. It is well settled that for errors of judgment committed in the exercise of either of these powers a municipal corporation is not liable in damages." This applies to the action of the city in passing the illegal ordinance under discussion in this case, and upon that question it is said by Cooley on Torts, p. 408:

"Whenever, therefore, the state confers judicial powers upon an individual, it confers them with full immunity from private suit; in effect, the state says to the officer that these duties are confided to his judgment; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear; that the duties concern individuals, but they concern more especially the welfare of the state, and the peace and happiness of society; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied indi-

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vidual shall not be suffered to call in question his official action in a suit for damages."

The same might be said with reference to the executive duties of a police officer, and of the liability of the corporation enforcing what it deems to be the law through the medium of such officers. If, for every miscarriage of a prosecution by reason of some unconstitutional provision in the law, criminals who were guilty of violating the law on the merits could get redress in damages against either the officer or the municipality, there would be a timidity in enforcing the law which would tend to paralyze the administration of justice.

In *McFadin v. San Antonio*, 22 Tex. Civ. App. 140, 54 S. W. 48, it was held that since a city, in the enactment of an ordinance against suspicious characters, acts in its governmental capacity and in the exercise of its police powers, it will not be liable for damages to the reputation of one arrested, fined, and imprisoned under such an ordinance, even though the ordinance be void; and that the motives of the mayor and city council in enacting the ordinances could have no effect upon the rule; citing *Easterly v. Irwin*, 99 Iowa 694, 68 N. W. 919; *New Orleans v. Kerr*, 50 La. An. 314, 23 South. 384, 69 Am. St. 442, and many other cases cited in support of the rule announced.

In *Caldwell v. Prunelle*, 57 Kan. 511, 46 Pac. 949, an action for false imprisonment, the court said:

"It is well settled that cities are not liable in an action for false imprisonment for the acts of their officers while enforcing invalid ordinances, or for other illegal or unauthorized acts. The provision in question is a police regulation, and the officers in enforcing the same were exercising a public and governmental function."

A town ordinance enacted under statutory authority therefore, prohibiting transients or peddlers from selling

their wares therein until they shall have procured a license therefor, is a police regulation, and the town is not liable for an arrest and imprisonment for an alleged violation thereof, even though the ordinance be invalid for any reason, though the injured party is, in fact, innocent of the charge, and though the city authorities directed the arrest for the purpose of protecting resident merchants from competition. *Easterly v. Irwin, supra*.

In *Buttrick v. Lowell*, 1 Allen 172, 79 Am. Dec. 721, it was decided that a city was not liable for an assault and battery committed by its police officers, even though it was done in an attempt to enforce an ordinance of the city; and, as bearing upon the question raised in the case at bar that the action was ratified by the city through the prosecution of the case by the city attorney, it was held in the case just cited that the action of a city in authorizing and employing its solicitor to appear and defend an action brought against its police officers for an assault and battery by them, does not make the city liable to pay damages for the assault and battery. An action of tort cannot be maintained against a town for the acts of its assessors and collectors in assessing and levying a poll tax upon a person not an inhabitant thereof, even if the assessors act with integrity and fidelity, and are therefore by the general statutes not themselves liable to an action. *Alger v. Easton*, 119 Mass. 77.

Trescott v. Waterloo, 26 Fed. 592, like the case at bar, was for imprisonment under a void ordinance, and it was held that a party who had been arrested for the violation of an unconstitutional municipal ordinance requiring a license fee to be paid by nonresident peddlars, and, on conviction, has served out his fine in prison, cannot maintain an action against the municipal corporation.

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Syllabus.

In *Town of Laurel v. Blue* (Ind.), 27 N. E. 301, it was held that a town is not responsible for an unlawful arrest by the town marshal, since in making arrests he is acting for the public, and is not the agent of the town; citing *Lafayette v. Timberlake*, 88 Ind. 330, where, in discussing a similar question, Elliott, J., said:

"Officers appointed to execute the laws and ordinances are not agents engaged in corporate duties, but are public officers, appointed at the command of the legislature by the corporation authorities. There is no more reason for holding cities responsible for the wrongs of police officers than there is for holding counties or townships responsible for the torts of sheriffs and constables."

See, also, *Faulkner v. Aurora*, 85 Ind. 130, 44 Am. Rep. 1; *City of Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. 35.

Under the great weight of authority, we think the court did not err in sustaining the demurrer to the complaint. The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4579. Decided December 10, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. H. ST. JOHN
DIX, *Appellant*.¹

CRIMINAL LAW—LARCENY BY EMBEZZLEMENT—CONTINUING OFFENSE—INFORMATION—DUPLICITY. An information charging a bank president with larceny by embezzlement "on the 15th day of August, 1900, and on divers dates and days from thence continuously to the 10th day of January, 1901," of certain moneys and funds, amounting in the aggregate to a specified sum, is not demurrable for duplicity, but charges one continuing crime.

¹Reported in 74 Pac. 570.

SAME—BILL OF PARTICULARS—DUPLICITY. A bill of particulars is not part of the information and even if it shows an intent to prove more than one crime, it does not render the information demurrable.

SAME. A bill of particulars showing that on various dates, specific sums were intrusted to the president of a bank, and that on a certain date thereafter he failed to account for the respective sums or any part thereof, does not indicate that more than one offense was intended to be proved under an information charging the embezzlement of the aggregate amount on divers days and dates continuously during the period specified.

EMBEZZLEMENT—CONSPIRACY BETWEEN OFFICERS OF BANK—SUFFICIENCY OF PROOF. Where letters, books and declarations of the accused's associates are received under a promise to prove a conspiracy to embezzle the funds of a bank, there is sufficient prima facie evidence of the conspiracy to make the testimony admissible where it appears that none of the parties had any means, that the banks purchased by them were insolvent to the knowledge of all, that they used the deposits of one to pay the debts contracted for the purchase of the others, and solicited deposits representing that the banks were solvent, that the money was taken by defendant with the knowledge of his associates, and the funds were embezzled when the opportunity arose, and accused's associates were in communication with him while he was a fugitive from justice.

SAME—EVIDENCE OF INSOLVENCY OF THE BANK. In a prosecution against a bank president for the embezzlement of the funds of the bank, evidence of the receipt of deposits after the accused left the state, and of the closing of the bank without paying any of the depositors, is properly admitted as tending to show the insolvency of the bank at the time the money was taken, and the deceit practiced upon the depositors.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered August 25, 1902, upon a trial and conviction of the crime of larceny by embezzlement. Affirmed.

Robert H. Lindsay and *Thos. D. J. Healy*, for appellant.

Parker Ellis, *John B. Hart*, and *A. E. Mead*, for respondent.

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MOUNT, J.—Appellant was convicted of the crime of embezzling funds belonging to the Scandinavian-American Bank of New Whatcom, of which bank he was president. It appears that, prior to his connection with the bank named, the appellant was insolvent, but he managed to purchase a controlling interest in the stock of the bank with borrowed money. After he had acquired his interest and was made president thereof, he repaid the borrowed money from funds of the bank, and subsequently took large sums from the bank and placed therein his unsecured promissory notes instead of the money taken. This money, placed to his credit in the bank from time to time, was drawn out daily, covering a period of two or three months, upon personal checks. It seems the bank was insolvent at the time he obtained control thereof, and, shortly after the money was drawn out, appellant left the state of Washington; and, some time thereafter, by diligent search, was located and apprehended in London, England, from whence he was brought here upon extradition, and tried and convicted. Shortly after appellant left the state, the bank closed its doors, without funds except about \$130 in money, and furniture and fixtures to the value of about \$3,000.

Numerous errors are alleged on this appeal, but they are argued under three heads, viz.: (1) that the court erred in overruling the demurrer to the information; (2) in admitting declarations of appellant's associates claimed by the state to have been co-conspirators; and (3) in admitting evidence of deposits made in the bank after appellant had left the state.

(1) The charging part of the information is as follows:

“Then and there being he, the said H. St. John Dix . . . on the 15th day of August, 1900, in the county of Whatcom and in the state of Washington, and on divers

dates and days from thence continuously to the 10th day of January, A. D. 1901, while then and there acting as the president and manager of the Scandinavian-American Bank, a banking corporation organized, existing, and doing business as such in the city of Whatcom, Whatcom county, state of Washington, during the period herein mentioned, did then and there unlawfully, fraudulently, wrongfully, and feloniously convert to his own use certain moneys and funds of said banking corporation, then and there intrusted to him by the said Scandinavian-American Bank, and has failed to account to the said Scandinavian-American Bank for such moneys or funds so intrusted to him, the amount so wrongfully, unlawfully, fraudulently, and feloniously converted to his own use by the said H. St. John Dix . . . amounting in the aggregate to the sum of twenty-two thousand seven hundred and ninety dollars (\$22,790.00), being of the value of twenty-two thousand seven hundred and ninety dollars (\$22,790.00), and being then and there the money and personal property of the Scandinavian-American Bank; he, the said H. St. John Dix, . . . did then and there wrongfully, fraudulently, and feloniously convert said money and funds of said bank to his own use and benefit, with the intent then and there to defraud the said Scandinavian-American Bank of the same; he, the said H. St. John Dix, . . . thereby committing the crime of larceny by embezzlement as the same is defined by statute of the state of Washington; and so the prosecuting attorney as aforesaid doth accuse the said H. St. John Dix . . . of the crime of larceny by embezzlement, by taking, stealing, and carrying away and converting to his own use the property of the said Scandinavian-American Bank, in the amount and of the value as aforesaid, all of which is contrary," etc.

To this information appellant filed a demurrer upon the ground of duplicity. This demurrer was overruled, whereupon a bill of particulars was demanded, showing the several amounts and dates of the embezzlement mentioned in the information, and the court ordered that such bill

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of particulars be furnished. The prosecution thereupon furnished a bill of particulars, the material part of which is as follows:

"Comes now the plaintiff and, complying with the order of the above entitled court in the above entitled cause wherein said court, on motion of the defendant herein, required this plaintiff to furnish to the defendant or his said attorney a bill of particulars showing at what dates and what several amounts the defendant is charged by the information herein with embezzling funds and moneys of the Scandinavian-American Bank, states as follows: Plaintiff will claim at said trial, and will introduce documentary and other testimony to the effect, that the Scandinavian-American Bank intrusted to the above named defendant, on the dates herein mentioned, the respective amounts stated herein, that is to say: On September 8th, 1900, the said Scandinavian-American Bank intrusted to the said defendant the sum of \$4000, or the proceeds of a certain promissory note, due on demand, dated September 8th, 1900, for the principal sum of \$4000. On September 4th, 1900, the said Scandinavian-American Bank intrusted to the said defendant the sum of \$6000, or the proceeds of a certain promissory note, due on demand, dated September 4th, 1900, for the principal sum of \$6000. On September 12th, 1900, the said Scandinavian-American Bank intrusted to said defendant the sum of \$2500, or the proceeds of a certain promissory note, due on demand, dated September 12th, 1900, for the principal sum of \$2500. On October 31st, 1900, the said Scandinavian-American Bank intrusted to said defendant the sum of \$2600, or the proceeds of a certain promissory note, due on demand, dated October 31st, 1900. On August 15th, 1900, the said Scandinavian-American Bank intrusted to said defendant the sum of \$2300, or the proceeds of a certain promissory note, due on demand, dated August 15th, 1900, for the principal sum of \$2300. On October 13th, 1900, the said Scandinavian-American Bank intrusted to said defendant the sum of \$500, or the proceeds of a certain promissory

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note, due on demand, dated October 13th, 1900, for the principal sum of \$500. On October 2d, 1900, the said Scandinavian-American Bank intrusted to said defendant the sum of \$1750, or the proceeds of a certain promissory note, due on demand, dated October 2nd, 1900, for the principal sum of \$1750. That on September 4th, 1900, the said Scandinavian-American Bank intrusted to the defendant herein the sum of \$4000, or the proceeds of a certain certificate of deposit issued by the cashier of said bank of said date, for the sum of \$4000 indorsed by the defendant herein. On September 4th, 1900, said Scandinavian-American Bank intrusted to the defendant herein the sum of \$2000, or the proceeds of a certain certificate of deposit issued by the cashier of said bank on said date, for the sum of \$2000, indorsed by the defendant herein. On October 22nd, 1900, the said Scandinavian-American Bank intrusted to the defendant herein the sum of \$2020, said sum being the proceeds of a certain draft dated October 22nd, 1900, for said sum of \$2020, signed by said defendant and payable to the First National Bank of Seattle. That the said defendant did, on or about the 7th day of January, A. D. 1901, fail to account to the Scandinavian-American Bank for said respective sums herein mentioned, or any portion thereof."

Appellant thereupon renewed his demurrer, which was also denied. It is claimed by appellant that the information upon its face is duplicitous, and, when taken in connection with the bill of particulars, charges ten separate and distinct embezzlements, each of which is independent of the others and susceptible of proof, if the charge be true. The information upon its face charges that the defendant "*on the 15th day of August, A. D. 1900, . . . and on divers dates and days from thence continuously to the 10th day of January, 1901, . . . did then and there . . . convert to his own use certain moneys and funds . . . and has failed to account for such moneys*

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and funds, . . . amounting in the aggregate to \$22,790." It is clear that this information charges a continuing offense from the 15th day of August, 1900, to the 10th day of January, 1901.

Appellant apparently concedes that there is a class of cases, like *State v. Reinhart*, 26 Or. 466, 38 Pac. 822; *Brown v. State*, 18 Ohio St. 496; *Jackson v. State*, 76 Ga. 551; and *Ker v. People*, 110 Ill. 627, 51 Am. Rep. 706, where the circumstances are such that, unless the prosecution is allowed to aggregate a continued systematic speculation on the part of an agent or employee, it might be impossible to secure a conviction, because the separate acts may not be susceptible of direct proof, and therefore proof of such continued taking is permitted; but it is contended that even in those cases but one offense must be alleged on an express date, and, when the exigencies of the case demand it on the trial, proof of a continuing offense may be made. His contention therefore must be that, if the information in this case had charged the crime to have been committed on August 15, 1900, the evidence showing a continuing speculation might have been received to prove the charge; but since the information charges the facts of a taking continuously from the 15th day of August, 1900, to the 10th day of January, 1901, it is therefore subject to duplicity. Such a result we think does not follow. If proof of a continuing act is sufficient to sustain a conviction for an act alleged upon a given date, it certainly follows that a continuing act may be alleged. The allegation of facts constituting the crime need be no stronger than the proof of the facts constituting such crime. For this reason we think that, under the rule stated in the authorities above cited, the information charges but one continuing crime and is sufficient.

Appellant further contends that the information, taken in connection with the bill of particulars, states ten separate and distinct offenses. "The bill of particulars is not a part of the information." *People v. McKinney*, 10 Mich. 54.

"It is quite generally if not universally held by the courts that the effect of a bill of particulars is to limit the claim and restrict the proof to the very matters therein specified." *Spokane & I. Lumber Co. v. Loy*, 21 Wash. 501, 509, 58 Pac. 672, 60 Pac. 1119.

"The sole office of the bill of particulars is to give the adverse party information which the pleadings by reason of their generality do not give." 3 Enc. Plead. & Prac. 527.

If the information charges but one crime, and the bill of particulars furnished indicates that the prosecution will attempt to prove at the trial a number of independent crimes, it does not follow that the information is subject to the objection of duplicity. The fact that the prosecution gives notice by a bill of particulars that it will attempt to prove other offenses, does not authorize the trial court to allow such evidence to be introduced at the trial; and, if such evidence were introduced, the fact that a bill of particulars was filed would not cure an error of that kind. Therefore, even if the bill of particulars in this case showed that the prosecution intended to rely upon ten separate offenses and introduce evidence thereof, that fact would not necessarily require the court to sustain a demurrer to the information for duplicity.

However, the bill of particulars in this case does not, in our opinion, indicate that more than one offense was intended to be proven. The bill of particulars states that on certain named dates the Scandinavian-American Bank intrusted to defendant certain sums of money, aggregat-

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ing in amount more than \$22,000. The ten sums making up this aggregate were intrusted at ten different times. The bill of particulars does not state that these different sums were embezzled at the different times named, when they were intrusted; but it does state that, on or about the 7th day of January, 1901, the defendant failed to account for the respective sums mentioned. There is nothing in the bill of particulars to show that the first, or any subsequent item, was embezzled at the time it was received. Nor is there any allegation in the information that any particular item was embezzled at a given time, but the allegation is that, *on the 15th day of August, 1900, and on divers days and dates from thence continuously to January 10, 1901*, the embezzlement took place. The clear and unequivocal statements, both of the information and of the bill of particulars, are that the funds were intrusted at different times and were converted continuously thereafter until the 10th day of January, and that the whole of these was one transaction. The demurrers were, we think, properly overruled. The evidence shows, that the money was taken by the appellant; that it was passed to his individual credit in the bank, and that it was drawn out by individual checks daily, and frequently several checks per day, until it was exhausted; that, in place of the money, the appellant, acting as president and in control of the funds, left his unsecured promissory notes and drafts; and that these securities were carried as cash on hand by the cashier to the extent of at least \$24,000.

(2) It is next argued that the court erred in receiving in evidence certain declarations and writings of the associates of appellant in his banking business, which declarations and writings were made when appellant was not present. This evidence was admitted by the learned trial

court under a promise that the prosecution would prove a conspiracy between appellant and these associates to embezzle the funds of the bank. It is now insisted that no such conspiracy was proved.

After carefully reading all the evidence in the case, we think there was sufficient evidence to show, *prima facie*, such conspiracy between appellant and these associates. None of them had any means. The banks which they purchased were insolvent; especially so was the Scandinavian-American Bank. They all knew this fact. They so manipulated the funds of this bank as to buy others, using the deposits of each to pay the debts contracted for the purchase of the others. Each of these associates was soliciting deposits, representing that the banks were solvent, when he knew they were not. When the banks were in their control, the appellant took the money with the knowledge of his associates, and left the state ostensibly for the purpose of raising funds for the use of these banks. While appellant was out of the state, he was in communication with these associates. He was apprehended in London, England, and while there was in company with some of the same associates. While it is not shown directly that the bank and the funds thereof were acquired by appellant and his associates for the purpose of taking the money therefrom, yet it is shown that, as soon as the opportunity came, appellant did take the money with the knowledge of his associates, and converted it. There are many other circumstances in the evidence tending to show knowledge and community of interest in the whole transaction. There was no evidence whatever offered at the trial on the part of the appellant. From the facts above stated, we think the evidence sufficiently showed a conspiracy to entitle the declarations, letters, and books of these associates to remain in evidence

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as against appellant. Underhill, Criminal Evidence, § 491; 1 Greenleaf, Evidence, § 111; *Card v. State*, 109 Ind. 415, 9 N. E. 591; *Johnson v. State*, 29 Ala. 62, 65 Am. Dec. 383; *State v. McCann*, 16 Wash. 249, 47 Pac. 443, 49 Pac. 216.

(3.) It is next claimed as error that the trial court permitted evidence to the effect that the bank received deposits after appellant had left the state, that none of the depositors received back any of their money, and that the bank shortly after receiving these deposits closed its doors. These facts were material, we think, as tending to show the insolvency of the bank at the time appellant took the money, and for the further reason that they tended to show a course of dealing intended to deceive the patrons of the bank. This evidence was therefore not error.

Finding no error in the record, the judgment is affirmed.

FULLERTON, C. J., and DUNBAR, ANDERS, and HADLEY, JJ., concur.

[No. 4785. Decided December 10, 1903.]

DAVID L. COPELAND, *Executor of the Estate of William Copeland, Deceased, Appellant*, v. CITY OF SEATTLE *et al.*, *Respondents*.¹

MUNICIPAL CORPORATIONS—NEGLIGENCE—LIABILITY FOR ACT OF BUILDER—DEATH OF PEDESTRIAN IN STREET—BUILDING PERMIT—WARNING. A city, by granting a building permit and failing to give notice of the danger in using a street, does not render itself liable for the death of a pedestrian in front of a building under construction, who was struck by a timber negligently thrown down by the party constructing the building.

DEATH BY WRONGFUL ACT—RIGHT OF ACTION—SUIT BY EXECUTOR FOR BENEFIT OF WIDOW. Under Bal. Code, §§ 4828 and 4838,

¹Reported in 74 Pac. 582.

an action for damages for wrongful death may be maintained by the decedent's executor, for the use of his widow, in the absence of an action by her, and is not subject to an objection of want of capacity in the plaintiff to sue, although the widow's sanction must be shown before the defense is put in.

Appeal from a judgment of the superior court for King county, Morris, J., entered June 30, 1903, upon sustaining a demurrer to the complaint, dismissing an action for damages for a death caused by negligently throwing a timber from the roof of a building into the street. Reversed in part and affirmed in part.

C. W. Turner (*R. W. McClelland*, of counsel), for appellant.

M. Gilliam and *William Parmerlee*, for respondent City of Seattle.

Wright & Kelleher and *John T. Condon*, for respondent The Swedish Evangelical Lutheran Gethsemane Church.

FULLERTON, C. J.—In this action the appellant, as executor of the estate of William Copeland, deceased, sought to recover damages for the death of his testator, caused, as he alleges, by the wrongful and negligent acts of the respondents. The respondents separately interposed demurrers to the complaint on the grounds, among others, that the appellant had no legal capacity to sue, and that the complaint failed to state facts sufficient to constitute a cause of action; which demurrers the trial court sustained, entering a judgment of dismissal after the appellant had elected to abide by his complaint.

For a cause of action the appellant alleged, in substance, that on May 15, 1901, the respondent The Swedish Evangelical Lutheran Gethsemane Church was engaged, as proprietor and under its own supervision, in the construction of a church building on its own property, situated in the

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city of Seattle; that, while it was so engaged in the construction of the building, the appellant's testator passed along the street in front of the building, the street being a public thoroughfare of the city of Seattle, when the church, without fault of the testator or warning or notice to him, "caused to be hurled down or thrown upon said street from the roof of said building, and from a distance of more than twenty feet from and above said street, a piece of plank or timber, which struck the said William Copeland upon the head, and thereby fractured and crushed his skull, and inflicted upon him a mortal wound, from which said wound he . . . died."

He further alleged that the "building was authorized by" the respondent city, but that neither the church nor the city took any precautions whatever to prevent the use of the street by pedestrians, or placed any kind of a warning thereon, notifying pedestrians that its use was dangerous.

On the matter of his right to maintain the action, the appellant alleged, that the deceased died testate, naming the appellant as his executor; that he had been confirmed as such by the superior court having jurisdiction over the testator's estate; that the deceased left a widow dependent upon him for support, but no child or children; that the widow was damaged because of the death of the deceased in the sum of \$15,000.00, for which sum judgment was demanded "for the benefit of such widow . . . and . . . to her use as damages"

Taking up the question of the sufficiency of the facts to constitute a cause of action, it is at once apparent that the demurrer of the city was properly sustained on that ground. True, it is alleged that the city "authorized" the construction of the building, and gave no notice or warning that there was danger in passing it while it was in the course of

construction, but this is insufficient either to fasten upon it the neglect of its co-respondent, which caused the death complained of, or charge it with an independent neglect. The allegation that the city authorized the construction of the building, when taken in connection with what is elsewhere alleged in the complaint, means no more than that the city granted to its co-respondent a permit to construct the building, or did not forbid its construction; it carries with it no implication of participation on the part of the city. Clearly, a city, by granting a building permit, does not render itself liable for the negligent acts of persons constructing a building under a permit so granted. Nor is this allegation aided by the allegation that no notice or warning of the danger was given. This was not a danger that the city was bound to guard against. Had it granted to the respondent church the right to use the street, and then knowingly suffered it to so use it as to endanger the lives of persons traveling upon the street, a different question would be presented; but it was not bound to anticipate that the persons erecting the building would be so grossly negligent as to throw a board from the roof of the building into the street. If it can be held liable for such an act, there is no wrong which one of its citizens may inflict upon another for which it is not liable.

It is not questioned that the facts stated are sufficient, as against the demurrer on that ground of the respondent The Swedish Evangelical Lutheran Gethsemane Church, but it is contended on its behalf that the appellant has no legal capacity to sue. The argument is that, inasmuch as the right of one person to maintain an action for the death of another is a statutory and not a common law right, and as the statute of this state grants the right only where there is

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a surviving widow, or child, or surviving children, the right to sue must be vested in those in whom the beneficial interest is vested, and an executor or administrator, or the estate which he represents, has no such interest. The sections of the code conferring the right to maintain an action for the death of a person caused by the wrongful act or neglect of another are as follows (Bal. Code, §§ 4828, 4838):

“The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as under all circumstances of the case may to them seem just.

“No action for a personal injury to any person occasioning his death shall abate, nor shall such right of action determine by reason of such death if he have a wife or child living, but such action may be prosecuted, or commenced and prosecuted, in favor of such wife, or in favor of the wife and children, or if no wife, in favor of such child or children.”

Construing these sections, we have held that the term “heirs” meant the widow and children of the deceased, and did not include parents and collateral heirs, and that the only persons who could be the beneficiaries of such an ac-

tion were the wife and children of the deceased. *Graetz v. McKenzie*, 3 Wash. 194, 28 Pac. 331; *Northern Pac. R. Co. v. Ellison*, 3 Wash. 225, 28 Pac. 333, 29 Pac. 263; *Hedrick v. Ilwaco R. & N. Co.*, 4 Wash. 400, 30 Pac. 714; *Dahl v. Tibbals*, 5 Wash. 259, 31 Pac. 868; *Noble v. Seattle*, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822; *Nesbitt v. Northern Pac. R. Co.*, 22 Wash. 698, 61 Pac. 141; *Robinson v. Baltimore, etc. Refining Co.*, 26 Wash. 484, 67 Pac. 274.

While in none of these cases was the precise question here presented before the court, yet in several of them it was touched upon, incidentally it may be, but in such a way as to clearly indicate what the court's views thereon were at the time the case was under consideration. For example, in *Graetz v. McKenzie* it was said that under the first section above quoted "either the heirs or personal representatives, but not both, may bring the action therein provided for, and recover such damages, pecuniary or exemplary, as to the jury may seem just under the circumstances." In *Hedrick v. Ilwaco R. & N. Co.* it was said: "Usually the right of action, as in Lord Campbell's act, is given to the executor or administrator, and the sum recovered inures to the benefit of the particular individuals designated by the statute. In this state, as has been seen, . . . the heirs or personal representatives may maintain the action, . . ." And in *Noble v. Seattle* the court quoted approvingly from *Henderson's Adm'r v. Kentucky Cent. R. Co.*, 86 Ky. 389, 5 S. W. 875, where it was stated by the Kentucky court, when passing upon a statute in the respect in question almost exactly like our own, that the right to maintain the action was vested in the administrator by the language used, although he could exercise the right

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only for the use and benefit of the wife and children of the deceased.

These cases, as we say, accepted the rule as unquestioned that an executor or administrator could maintain an action against any one who, by wrongful or negligent acts, caused the death of his testator or intestate, provided the deceased left a widow, a child, or children, dependent upon him for support; and this, whether such persons were, or were not, under disability to sue in their own names. It seems to us now that this is the correct construction of the statute. It is the only way effect can be given to the phrase "personal representatives," as used therein, without departing from its natural and usual meaning. The legislature has power to confer upon one person the right to maintain an action for the use and benefit of another, and the argument *ab inconvenienti* will not be allowed to weigh as against a plain grant of the right.

It is true, the defendant cannot be subjected to two actions for the one cause, and as the widow has the first right to sue, it must be made to appear, at some stage of the proceedings prior to the time the defendant is called on to put in his defense, that the widow has knowledge of, and sanctions the action brought by the personal representative, so that she cannot afterwards repudiate his acts and maintain an action in her own name. The danger of a defendant's being subjected to more than one action is, however, not very real. It is always within the power of the courts to protect a defendant against the possibility of being so subjected, and doubtless they will do so when called on at the proper time.

Of the cases from other jurisdictions where similar statutes exist, the only one cited as taking an opposite view is the supreme court of South Dakota in the case of *Belding*

v. Black Hills & Ft. P. R. Co., 3 S. D. 369, 53 N. W. 750. That court held in the case cited that the statute created successive rights of action, vesting the right first in the widow, to the exclusion of the heirs and personal representatives; next in the heirs, to the exclusion of the personal representatives; and lastly, in the personal representatives, for the benefit of the estate of the deceased; holding that the right to maintain the action carried with it the exclusive right to the damages recovered. This construction of the statute as to the persons entitled to the damages recovered, it will be noticed, is at variance with the decisions of this court in the cases cited, *supra*, and we cannot think it in point on the question under discussion for that reason. If it be the rule that the right to the damages goes first to the widow, to the exclusion of the heirs and personal representatives, and to the others in order, then the holding that the one entitled to the damages must sue for it, and has the exclusive right so to do, is undoubtedly sound. But we have held that the widow and children share the damages recovered jointly; and that, if there be no widow or children, there is no right of recovery at all—a construction of the statute wholly different from that given it by the South Dakota court, and one which seems to us must call for a different rule on the question as to who has the right to maintain the action. Other cases more nearly in point are the following, which support the rule as we have announced it: *Louisville & N. R. Co. v. Sanders*, 9 Ky. L. 690, 5 S. W. 563; *Henderson's Adm'r v. Ky. Cent. R. Co.*, *supra*; *Munro v. Dredging etc. Co.*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. 248; *Dueber v. Northern Pac. R. Co.*, 100 Fed. 424.

The judgment appealed from is affirmed as to the respondent the City of Seattle, and reversed and remanded

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as to the respondent The Swedish Evangelical Lutheran Gethsemane Church, with leave to such respondent to answer to the merits within such time as the trial court may fix.

MOUNT, DUNBAR, ANDERS, and HADLEY, JJ., concur.

[No. 4824. Decided December 10, 1903.]

P. J. HENNESSY *et al.*, *Appellants*, v. TACOMA SMELTING
& REFINING COMPANY *et al.*, *Respondents*.¹

APPEAL—TIME FOR TAKING—MOTION TO VACATE JUDGMENT. Where a motion is made to vacate an irregularly entered judgment dismissing an action, the time for taking an appeal from the judgment begins to run from the date of the order denying the motion, in as much as the motion involves the judgment. (*State ex rel. Hennessy v. Huston*, 32 Wash. 154, followed.)

APPEAL—DISMISSAL—CESSATION OF CONTROVERSY—DISMISSAL OF SUBSEQUENT SUIT—WHEN NOT A BAR. Where, pending an appeal from a judgment of dismissal, a like suit is commenced in the federal court and also dismissed, the dismissal of the second case by the federal court is not *res judicata* of the former suit, operating to work a dismissal of the appeal for want of any actual controversy, where the judgment of the federal court is expressly limited to the question whether the complainants are entitled to any relief in equity by reason of facts occurring since the date of the original decree from which the appeal is taken.

JUDGMENT—RES JUDICATA—APPEAL PENDING. A Judgment of the federal court dismissing an action is not *res judicata* of like matters involved in a prior suit in the state court, when it appears that the federal cause has been appealed to the United States circuit court of appeals, and that no mandate has been received or filed in the clerk's office.

JUDGMENT—PREMATURELY ENTERED WITHOUT HEARING. A judgment entered on the court's own motion after issue joined, without any hearing, trial, or opportunity for hearing, is premature and irregular, and will be reversed on appeal. (*State ex rel. Hennessy v. Huston*, *supra*, followed.)

¹Reported in 74 Pac. 584.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered March 6, 1902, dismissing an action for want of equity upon the court's own motion; and also from an order entered January 3, 1903, denying plaintiffs' motion to vacate the judgment. Reversed.

Parsons, Parsons & Parsons, T. L. Stiles, and Edward L. Parsons, for appellants. In opposition to the motion to dismiss the appeal, counsel contended, *inter alia*, that the appeal in the federal case removes that cause for a trial *de novo* in the appellate court, and suspends the operation of the federal judgment as an estoppel. *Sharon v. Hill*, 26 Fed. 337; *Day v. De Jonge*, 66 Mich. 550, 33 N. W. 527; *Haynes v. Ordway*, 52 N. H. 284; 2 Black, Judgments, § 510. In this an appeal differs from a writ of error. *Oregonian R. Co. v. Oregon R. & Nav. Co.*, 27 Fed. 277. It cannot be an estoppel, for it is expressly limited to subsequent events. 2 Black, Judgments, § 506; *Cromwell v. Sac County*, 94 U. S. 351, 24 L. Ed. 195; *Marble Sar. Bank v. Williams*, 23 Wash. 766, 63 Pac. 511.

Fogg & Fogg, W. H. Bogle, and Jessie Thomas, for respondents. Upon the motion to dismiss the appeal, counsel contended, among other things, that the appeal was not taken within the time limited by Bal. Code, § 6502. *National Christian Ass'n v. Simpson*, 21 Wash. 18, 56 Pac. 844; *State v. Symes*, 17 Wash. 596, 50 Pac. 487. The judgment was a final judgment. *State ex rel. Hennessy v. Huston* (Wash.), 72 Pac. 1017. It was not necessary or proper to move its vacation. *Van Horne v. Watrous*, 10 Wash. 525, 39 Pac. 136. It was not "irregularly" obtained. *Noerdlinger v. Huff*, 31 Wash. 360, 72 Pac. 73. The sufficiency of the complaint was challenged, and in an equitable suit the dismissal of a case upon the court's own motion for insufficiency of the complaint may be erroneous.

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but cannot be said to be "irregular." *Fougeres v. Jones*, 66 Fed. 316; *Brown v. Piper*, 1 Otto 37, 23 L. Ed. 200; *Quirolo v. Ardito*, 1 Fed. 610; *Baker v. Biddle*, Baldwin 394, Fed. Cas. No. 764; *Earles v. Earles*, 40 Tenn. 366; *Surber's Adm'r v. McClintic*, 10 W. Va. 236; *Kemble v. Cresap*, 26 W. Va. 603; 1 Daniels, Chancery (5th Ed.), p. 801; Fletcher, Equity Plead. & Prac., § 575. The same rule applies where the bill shows that the plaintiff has an adequate remedy at law. *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; *Parker v. Winnipisogee Co.*, 2 Black 545, 17 L. Ed. 333; *Hipp v. Joly*, 19 How. 271, 15 L. Ed. 633; *Dumont v. Fry*, 12 Fed. 21; *McGuire v. Pensacola County*, 105 Fed. 677. Or where the bill is multifarious. *Rutherford v. Alyea*, 54 N. J. Eq. 411, 34 Atl. 1078. The fact that an answer has been filed is immaterial. *Fourgeres v. Jones*, and *Brown v. Piper*, *supra*. Our practice in equity is in accordance with the common law practice. *Somerville v. Johnson*, 3 Wash. 140, 28 Pac. 373; *Waite v. Wingate*, 4 Wash. 324, 30 Pac. 81; *Washington Nat. Bldg. etc., Ass'n v. Saunders*, 24 Wash. 321, 64 Pac. 546; *McKee v. McKee* (Wash.), 73 Pac. 358. Neither the motion to vacate, nor the appeal from the order, can take the place of a direct appeal from the judgment. *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182; *State ex rel Hennessy v. Huston*, *supra*.

HADLEY, J.—Respondents move the court to dismiss this appeal. It is urged that the appeal was not taken in time, and that this court is without jurisdiction to entertain it. The reasons advanced in support of this phase of the motion were discussed in *State ex rel. Hennessy v. Huston*, 32 Wash. 154, 72 Pac. 1015. In that case a writ of mandate was sought to require the trial court to settle and certify the statement of facts proposed in the case now before us.

It was there contended that the time for appeal in this case began to run from the date of the original judgment of dismissal. But it appeared that a motion had been made to vacate the judgment on the ground that it was irregularly entered. This court held that the motion was well taken, and also that the time for appeal began to run from the date of the order denying the motion to vacate, inasmuch as it involved a judgment irregularly entered. We refer to what was said in that case as decisive against respondents upon this branch of their motion to dismiss the appeal.

The motion to dismiss is further urged upon the ground that there is no merit in the further prosecution of the appeal, for the reason that there is now no actual controversy involving real or substantial rights between the parties to the record, and no subject matter upon which any judgment in favor of appellants can operate. In support of this ground of the motion, it is contended that events occurring subsequently to the judgment have eliminated the controversy involved in this case. This contention is chiefly based upon a certified record filed here from the circuit court of the United States for the District of Washington, Western Division. That record shows that, after the original judgment of dismissal was entered in this case, some of the appellants here filed a bill in equity in the above named court against certain of the respondents here. The bill was dismissed as being without equity against the defendants in the action. It is now urged here by respondents that the subject matter of the two suits is the same, and that the judgment of the federal court is *res judicata* of the matters involved in this case. Appellants, upon the other hand, insist that there is an essential difference between the purposes of the two suits, and that the parties are not the same in each. It does appear from the record that the parties

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are not identical, and we deem it unnecessary to discuss the question of the identity of the subject matter of the two suits for reasons which appear in the memorandum decision of the federal court, found in the certified record before us. Referring to the judgment of the superior court in the case at bar, the decision says:

"That decree has not been attacked for fraud, and this court has no power to set it aside. Therefore the issues in this case are narrowed and limited by the plea of *res adjudicata* to the question whether the complainants are entitled to any relief in equity by reason of the facts and transactions since the date of that decree, viz., March 6, 1902."

It is thus apparent that the only question adjudicated by the federal court was whether the complainants in that case were entitled to any relief by reason of facts occurring after the date of the judgment of the superior court. The court expressly declined to adjudicate the matters involved in the superior court case, all of which occurred prior to March 6, 1902.

In any event, however, even if the decision and judgment of the federal court purported to adjudicate the matters involved in the case at bar, it appears by a certificate of the clerk of that court, filed here by appellants, that said cause has been appealed to the United States circuit court of appeals for the ninth circuit, and that no mandate from said appellate court has been received or filed in his office. Under any view of that judgment, it cannot, therefore, now be said to be final and *res judicata* of matters involved in the case on appeal here. The motion to dismiss the appeal is denied.

The merits of this appeal were practically determined by the decision in *State ex rel. Hennessy v. Huston, supra*. It was there held that the judgment appealed from was prema-

turely entered, that it was entered by the court of its own motion after issue joined under the pleadings, and without any hearing, trial, or opportunity for hearing under such issues; all of which made it an irregular judgment.

For the reasons assigned in that opinion, the judgment is reversed, and the cause remanded, with instructions to the lower court to proceed with the trial under the issues joined.

FULLERTON, C. J., and ANDERS, DUNBAR, and MOUNT, JJ., concur.

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34	130

[No. 4744. Decided December 11, 1903.]

THE PACIFIC NATIONAL BANK OF TACOMA, *Respondent*, v. THE AETNA INDEMNITY COMPANY (*implied with Claude M. Seeley*), *Appellant*.¹

INSURANCE—GUARANTY—AUTHORITY OF AGENTS—POWER OF ATTORNEY—CONSTRUCTION. A letter of attorney authorizing an insurance agent to execute as attorneys in fact all bonds guaranteeing the fidelity of persons "and the performance of contracts other than insurance policies," is sufficiently broad to authorize a contract guaranteeing the repayment of money loaned by a bank for the purpose of completing the construction of a vessel, *Laws of 1897*, pp. 332, 333, recognizing such indemnity obligations.

SAME—EVIDENCE OF AUTHORITY. The charter of the company reciting the same powers is also properly received in evidence to show the agents authority.

SAME—PRINCIPAL AND AGENT—LOCAL AGENT REPRESENTING BOTH PARTIES—BOND TO AGENT AS PRINCIPAL—APPROVAL AND REPRESENTATIONS BY GENERAL AGENT. The bond of a surety company guaranteeing the repayment of a loan made to S as trustee for ship builders, for the purpose of completing the construction of a ship, which provided that it should not be valid until signed on the part of the company by S, who was its district agent, and which bond is signed by S, trustee, as principal in the bond, and

¹Reported in 74 Pac. 590.

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Citations of Counsel.

also as district agent for the company, is not on that account void on the theory that S acted as agent for both principal and surety, where it further appears that it was executed and delivered in the presence of the general agents, who secured the loan by representations as to the surety company's interest in the construction of the ship, and the bond was also signed by them, and S, who was a subordinate agent, signed as district agent at their request, the clause requiring such district agent to sign having been inserted by the general agents without being required by the company.

SAME—KNOWLEDGE—RATIFICATION. Such signing by the district agent must be held to have been with the knowledge and consent of the company, the general agents having acted within the scope of their authority, and in good faith, and there being no evidence that the agent was secretly acting for both parties.

SAME—CLAUSE IN BOND REQUIRING SIGNATURE BY DISTRICT AGENT—EXECUTION BY GENERAL AGENTS. Where general agents of a surety company appoint a district agent, and, without the company's requirement, insert a clause that the bond shall not be valid until signed by the district agent, a bond signed by the general agents, under a letter of attorney empowering them to sign all bonds, does not require the signature of the district agent as such, where he is the principal in the bond.

SAME—CONSIDERATION—PREPAYMENT OF PREMIUM. An indemnity bond guaranteeing the repayment of money advanced is valid without the payment of any premium, when it contains no condition making such payment a prerequisite, and the advance was secured by representations of the company's general agents showing an interest of the company in the advance, which was to save a loss on other bonds issued by the company.

TRIAL—DIRECTED VERDICT. When the evidence authorized judgment for the plaintiff, and defendant offers no evidence, there is no disputed evidence on material points, and it is proper to direct a verdict for the plaintiff.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered February 28, 1903, upon the verdict of a jury rendered in favor of plaintiff by direction of the court. Affirmed.

Campbell & Powell, for appellants. The contract required the exercise of judgment and discretion by the

agent, and is void when he acts for both parties, regardless of the fact of fraud or actual injury. *New York Cen. Ins. Co. v. National etc. Ins. Co.*, 14 N. Y. 85; *S. C.* 20 Barb. 470; *Claflin v. Farmers' Bank*, 25 N. Y. 293; *S. C.* 24 How. Prac. 1; *Empire State Ins. Co. v. American Cent. Ins. Co.*, 138 N. Y. 446, 34 N. E. 200; *Ritt v. Washington Ins. Co.*, 41 Barb. 353; *Michoud v. Girod*, 4 How. 513, L. Ed. 1076; *Porter v. Woodruff*, 36 N. J. Eq. 174; *Greenwood v. Spring*, 54 Barb. 377; *Everhart v. Searle*, 71 Pa. St. 256; *Farnsworth v. Hemmer*, 1 Allen (Mass.) 494; *Meyer v. Hanchett*, 43 Wis. 246. The clause in the bond was sufficient to give the bank notice. *Shauer v. Alterton*, 151 U. S. 607, 14 Sup. Ct. 412, 38 L. Ed. 286. Guaranteeing the agent's note was not authorized and was a fraud upon the company. *Wing v. Hartupee*, 122 Fed. 897.

E. M. Hayden and *John A. Shackleford*, for respondent.

HADLEY, J.—This is a suit upon a guaranty bond. The instrument sued upon purports to have been executed by Seeley & Co. as trustee for John B. Hardy and the Hardy Ship Building Company, as principals, and by the appellant the Aetna Indemnity Company, a corporation existing under the laws of the state of Connecticut, as surety. The bond runs to the Pacific National Bank, respondent herein, and is in the sum of \$7,500. It contains the following recitals as to its purpose and conditions:

“Whereas, Seeley & Co., agents, are acting as trustee for John B. Hardy and the Hardy Shipbuilding Co., and as such trustee are completing two contracts, viz., building one barkentine, called the ‘John C. Meyers,’ for the firm of Sudden & Christenson, of San Francisco, California, and one steam schooner for Captain A. W. Horne; and as such trustee it becomes necessary to advance money on these contracts, they have therefore entered into an agreement with the Pacific National Bank in consideration of

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their advancing the funds necessary in an amount the total of which is not to exceed the total of this bond, principal and interest, and they hereby agree as such trustee that said money shall be repaid to the said Pacific National Bank on or before October 12th, 1902.

"Now, therefore, the condition of the foregoing obligation is such that, if the principle shall well, truly, and faithfully comply with all the terms, covenants, and agreements on their part to be kept and performed, according to the tenor thereof, and shall well and truly pay the moneys thus advanced by the said Pacific National Bank, then this obligation to be null and void; otherwise to be and remain in full force and virtue in law."

The complaint alleges the advancement of money by the bank in accordance with the terms of the agreement mentioned in the bond to the extent of \$7,500, and also that default was made in its payment. As a defense the answer alleges, that, at the time of the execution and delivery of the purported bond, Claude M. Seeley, under the name of Seeley & Co., was employed by appellant under a stated compensation as its district agent to solicit indemnity and guaranty risks, and in his discretion and judgment to deliver all bonds made by appellant in the district embracing the city of Tacoma; that all bonds delivered by appellant in said district, while said Seeley & Co. was in the employ of appellant, contained the following express condition: "This bond shall not be valid, however, until signed by Seeley & Co., district agents at Tacoma, Washington." It is further alleged that it was the duty of said Claude M. Seeley, under the name of Seeley & Co., as such agent, if in his judgment any risk offered was a proper one, to countersign the bonds of appellant covering such risks in order to complete the execution thereof by appellant; that the respondent bank had notice of the fact of such agency, and of the extent of its powers and duties; that, at the time of

the execution of the purported bond, said Seeley was acting as agent and trustee for John B. Hardy and the Hardy Ship Building Company mentioned therein, and as such agent was clothed with large powers and broad discretion; that, in purporting to accept said risk and to execute said bond, he attempted to act as agent both for appellant and for said John B. Hardy and the Hardy Ship Building Company, without the knowledge or consent of appellant; that, upon learning that said purported bond had been so executed, appellant immediately disaffirmed the said acts of said Seeley, and that said purported bond is void as against public policy. It is further alleged that the bond is without any consideration moving to appellant.

At the trial, after the plaintiff rested, the defendant also rested without offering any testimony. Thereupon the plaintiff challenged the legal sufficiency of any evidence in the case to constitute a defense, and moved the court to decide, as a matter of law, that the plaintiff is entitled to a verdict and judgment as prayed in the complaint, and further that the case be taken from the jury, and judgment directed in favor of plaintiff. The motion was granted, the jury discharged, and judgment accordingly entered. The defendant surety company has appealed from the judgment.

It is assigned that the court erred in admitting in evidence, over objection, the letter of attorney from appellant to one Clemens, as evidence of his authority to execute the bond in question. The bond was signed by said Clemens as the attorney in fact of appellant, and it was sought by the offered evidence to show his authority for so signing. It is contended that the operative words of the letter of attorney are insufficient to authorize the execution of a bond of the nature of the one in question, which it is insisted is a con-

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tract of credit insurance. The following words appear in the letter of attorney :

"That he be, and he is, hereby authorized and empowered to execute and deliver and attach the seal of the company to any and all bonds and undertakings for, or on behalf of, the company in the business of guaranteeing the fidelity of persons holding places of public or private trust, and the performance of contracts other than insurance policies."

The learned trial court adopted the view that the words, "and the performance of contracts other than insurance policies," are broad enough to authorize the execution of bonds guaranteeing the performance of all kinds of contracts except insurance policies. In that view we concur. Our statute (chap. 114, Session Laws 1897, pp. 332, 333) recognizes that indemnity obligations to guarantee the performance of contracts may be authorized by guaranty companies. We think it was not error to admit the letter of attorney.

A similar error is assigned upon the admission in evidence of a certified copy of the charter of appellant company. The offered evidence recites the same powers which were contained in the aforesaid letter of attorney, and, for the reasons stated in reference to the admission of the latter, it was not error to admit the evidence in question. Both broadly authorize the guaranteeing of contracts. The contract guaranteed here was the agreement to repay certain advancements to be made by respondent bank.

It is next urged that the court erred in admitting in evidence the bond in suit. The instrument contained the words hereinbefore quoted, viz., "This bond shall not be valid, however, until signed by Seeley & Co., district agent at Tacoma, Washington." It will be remembered that the above words were set out in appellant's answer, and alleged to have been required by appellant in all bonds executed

and delivered in its behalf in the district, including the city of Tacoma. It is not disputed that Mr. Seeley, under the style of Seeley & Co., was the trustee and agent of the principals in the bond, and it was executed by him for the principals as such agent and trustee. The instrument was also countersigned as follows: "Countersigned at Tacoma, Wash., this 12 day of June, 1902. Seeley & Co., district agent." Upon the face of the instrument, it would therefore appear that Mr. Seeley acted as agent for both the principals and the surety in the execution of the bond. If such were the fact, and if appellant had not consented thereto, we apprehend that the objection to the introduction of the bond as evidence should have been sustained for reasons of public policy, since such reasons prevent one from acting as agent for both parties to a transaction without their consent.

The evidence however showed, that, at the time the bond in question was executed, the firm of Clemens & O'Bryan, of Portland, Oregon, were the general agents of appellant for the states of Oregon and Washington; that, for the purpose of executing bonds, W. J. Clemens of that firm held the power of attorney to which reference has already been made. The Mr. Seeley mentioned was appointed by said firm of Clemens & O'Bryan as their subordinate agent to procure business in Tacoma and vicinity. The evidence did not show that appellant itself had required the words quoted above to be inserted in its bonds. Said Clemens testified that he caused those words to be inserted in bonds executed and delivered in the Tacoma district under the theory that it might be necessary, in order to fully comply with the law of this state permitting appellant to do business here, for some one residing in the state to countersign the bonds as an agent. The custom of including said

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clause, and of countersigning bonds in that manner, was thus inaugurated by said Clemens and his firm, and not by any requirement of appellant, as far as appears from the evidence.

It further appeared from the testimony that said Clemens himself, while acting as the general agent of appellant, went with Mr. Seeley to the respondent bank and requested advancements to said John B. Hardy and the Hardy Ship Building Company, for whom Seeley was trustee. The bank at first declined to make them, but Clemens stated to the officers of the bank, that the appellant company had already given a bond; that he had been looking the matter up, and was quite sure that the payments due on the ship would take care of any advances; that appellant would be willing to guarantee that the money would be paid in that way, and offered to furnish a bond in order to keep appellant out of trouble. With such offer to give the bond of appellant, it was then agreed that the bank would advance sums not exceeding \$7,500. The bond was then drawn by Clemens, and signed by him as attorney in fact. It was further signed, "Clemens & O'Bryan, Manager." Clemens then requested Seeley to countersign it, after the manner he had been in the habit of doing with other bonds, and Seeley did so upon Clemens' request. The bond was then delivered to the bank by Clemens, or at least in his presence and by his direction, and the advancements were afterwards made.

Under the testimony, we therefore think the bond was executed by Clemens as the general agent of appellant, and under the power of attorney aforesaid; that the inclusion of the quoted words in the bond was not required by appellant, but they were inserted by Clemens, who had authority to execute a bond without them; that, although Seeley did

formally countersign the bond, conformably to the inserted clause, yet he did it at the request of Clemens, appellant's agent, and he did not in fact represent appellant in the execution of the bond, but it was actually represented by its general and duly authorized agent, the superior of Seeley.

Clemens, as the general agent of appellant, had full notice. He knew that Seeley was the agent of the principals in the bond, and, with that knowledge, requested him to countersign it in the name of appellant. Even if the countersigned signature possessed any real virtue, in the execution of the bond Clemens was acting within the scope of his authority, and his consent that Seeley should countersign it must be held to have been with the knowledge and consent of appellant. This is the general and well recognized rule. Mechem on Agency, § 718; 1 Am. & Eng. Enc. Law (2d ed.) 1144.

The cases cited by appellant did not show knowledge and consent on the part of the principal, and, even where the agent was shown to have had knowledge, it was held not to have been knowledge of the principal, because the agent was engaged in some scheme to defraud the principal. Such was the case in *Henry v. Allen*, 151 N. Y. 1, 45 N. E. 355, 36 L. R. A. 658, and also in *American Surety Co. v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977. In the case of *Shepard v. Hill*, 6 Wash. 605, 34 Pac. 159, also cited, the agent was secretly acting for both parties. There is no such showing in this case. Clemens was clearly acting within the scope of his authority in executing this bond, and there is no showing of fraud. But, upon the contrary, under his testimony, which is not disputed, he believed that by the issuance of this bond his company would be saved a loss upon another bond by means of the advancement made

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under this one, and ultimately any loss whatever. Appellant is not, therefore, now in position to say that it did not consent that Seeley should countersign as he did; but, for reasons already stated, we think the bond became effective under the circumstances of its execution, even without that signature. The court did not err in admitting the bond in evidence.

It is further assigned that the court erred in denying appellant's motion to take the case from the jury, and in not deciding as a matter of law that a verdict should be found in favor of appellant, and in not directing a judgment for appellant. In view of what we have already said, we deem it unnecessary to discuss this assignment generally. There is one point raised, however, which merits discussion. If the evidence had not shown this bond to be an obligation of appellant, then it followed that appellant's motion should have been granted. It is urged that no evidence showed that any premium had been paid appellant for this bond, and that it was therefore without consideration. Ordinarily the consideration of the contract for the performance of which a surety obligation is given, is sufficient to sustain such obligation, as against the surety. A consideration moving to the principal alone, contemporaneous with or subsequent to the promise of the surety or guarantor, is sufficient. 1 Brandt on Suretyship & Guaranty, § 15; *Mackenzie v. Board, etc.*, 72 Ind. 189; *Staver & Walker v. Missimer*, 6 Wash. 173, 32 Pac. 995, 36 Am. St. 142.

Appellant, however, cites *Frost on the Law of Guaranty Insurance*, § 29, as supporting its contention that such a guaranty contract as the one before us is not binding unless a premium has been paid to the insurer. The author states that the existence of the premium as the consideration dis-

tinguishes the contract of fidelity insurance from the obligations of private and gratuitous suretyship. He cites but one case in support of the paragraph cited, *People ex rel. National Surety Co. v. Feitner*, 166 N. Y. 129, 59 N. E. 731. But we are unable to see that the case is authority for the broad statement of the author. Indeed, we understand it to be cited only to the point that "the premium, in the absence of special provisions in the policy authorizing it, cannot be recovered back by the insured upon offering to surrender up his policy." We are therefore left with the unsupported statement of the author.

The broad doctrine announced, if literally applied, would seem to make it necessary in all cases for the person who is to be protected by a guaranty bond to see that the principal therein has paid the premium, and that, too, without regard to the fact that the bond has been actually delivered by the insurer. It seems to us that the rule must be that, when the insurer delivers a bond guaranteeing the acts of another, the beneficiary may assume that the premium has been paid; otherwise, that the bond would not have been executed and delivered; and that the insurer cannot afterwards be heard to say that the premium was not paid, as against the beneficiary who has in good faith parted with value on the strength of the promise in the bond. Especially must this be so when there is no recital in the bond that the payment of the premium is a necessary prerequisite to give it vitality. Guaranty insurance contracts must be controlled largely by the rules which govern ordinary insurance contracts, and under such rules it is not necessary that the premium be actually paid, provided a condition of the policy does not make payment a prerequisite, and the insurer does not insist upon it. 16 Am. & Eng. Enc. Law (2d ed.) 857.

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This principle is sustained by the following authorities cited by the editor of the text in the above cited volume, and which we have examined: *King v. Cox*, 63 Ark. 204, 37 S. W. 877; *Firemen's Ins. Co. v. Kuessner*, 164 Ill. 275, 45 N. E. 540; *Jones v. N. Y. Life Ins. Co.*, 168 Mass. 245, 47 N. E. 92; *Lum v. United States etc. Ins. Co.*, 104 Mich 397, 62 N. W. 652; *Campbell v. American etc. Ins. Co.*, 73 Wis. 100, 40 N. W. 661.

There is no condition in the bond before us making the payment of premium a necessary prerequisite, and payment was not exacted at the time the bond was delivered to respondent. We therefore conclude that, under the circumstances attending the delivery of this bond, the nonpayment of premium became immaterial, as between the insurer and the respondent. The material evidence has been already set forth, and we think it was such that the court did not err in denying appellant's motion to take the case from the jury, and in refusing to direct judgment for appellant.

It is next urged that the court erred in granting respondent's motion to take the case from the jury, and in awarding judgment for respondent. Appellant offered no evidence, and there was therefore no disputed evidence upon material points for the consideration of the jury. Under such circumstances, both the evidence and the law, as we view them, authorized a judgment for respondent, and it was not error to grant the motion.

The judgment is affirmed.

FULLERTON, C. J., and DUNBAR, MOUNT, and ANDERS, JJ., concur.

[No. 4807. Decided December 11, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. CHARLES
LINDGRIND, *Appellant*.¹

HOMICIDE—MANSLAUGHTER EXCLUDED BY EXTRADITION ON CHARGE OF MURDER—INSTRUCTIONS DEFINING CRIME. Where the accused was extradited on the charge of murder, and so could be tried only for that offense, it is not error to refuse an instruction defining the crime of manslaughter and instructing that under the extradition laws he can not be tried therefor, and to acquit if guilty thereof, when the court properly defines murder in the first and second degrees, purposely, deliberation, premeditation, and malice, and instructs the jury to acquit if not guilty of either of the crimes defined, since the object of the requested instruction to obviate confusion between manslaughter and murder was fully met by the explicit instructions given.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered March 9, 1903, upon a trial and conviction of the crime of murder in the second degree. Affirmed.

Henry McLean, for appellant.

J. C. Waugh and *M. P. Hurd*, for respondent.

DUNBAR, J.—On the night of August 30, 1902, an old man named George Leake, living alone in Skagit county, was most brutally assaulted by some unknown person, and so badly beaten, kicked, and abused, that he died from the effects of such treatment. The evidence causing suspicion to rest upon the defendant was the dying declaration of Leake. The defendant left the jurisdiction, but about six weeks afterward was arrested in British Columbia, and was extradited for the crime of murder. It is conceded by both appellant and respondent that the appellant

¹Reported in 74 Pac. 565.

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could only be tried for the crime for which he was extradited, so that we shall not enter into a discussion of that proposition. At the close of the trial the defendant requested the court to instruct the jury as follows:

"The information in this case charges the defendant with the crime of murder in the first degree. This includes the lesser crimes of murder in the second degree and manslaughter. Under it, if the evidence so warrants, you may find the defendant guilty of murder in the first degree or murder in the second degree, but not of manslaughter. The defendant has been extradited from British Columbia upon the charge of murder, which includes murder in the first degree and second degree as heretofore defined, but does not include manslaughter, and under the extradition law the defendant cannot be tried for the crime of manslaughter. Therefore, if you find from the evidence that the defendant is guilty of manslaughter, it is your duty to acquit him. Manslaughter is defined to be by our statute as follows: 'Every person who shall unlawfully kill any human being without malice, express or implied, either voluntarily, upon a sudden heat, or involuntarily, but in the commission of some unlawful act, shall be deemed guilty of manslaughter.'"

This instruction the court refused, and to the action of the court in so refusing, the defendant excepted. The contention is earnestly made by the appellant, that the court's refusal to so instruct was prejudicial error; that, inasmuch as the lesser crime of manslaughter is included in the crime of murder, and inasmuch as the jury is ordinarily empowered to find the defendant guilty of manslaughter on an indictment for murder, the jury might have so found in this case if it had been instructed in relation to the definition of manslaughter. No cases bearing on this point have been cited, and, so far as we are advised, the precise question has never arisen.

Ordinarily, of course, it is the duty of the court to instruct on the subject of manslaughter, because under the law it is a material issue in the case for the reason that the defendant may be punished for manslaughter. Hence the necessity of a verdict finding him guilty of manslaughter, if such verdict is justified under the testimony. But in this case it is conceded that a verdict of manslaughter would be equivalent to a verdict of not guilty. Under such a state of facts, the only possible object to be obtained in defining manslaughter would be to prevent the jury from confusing the facts necessary to constitute the crime of manslaughter with the facts necessary to constitute the crime of murder. If the danger of such confusion was obviated by such plain instructions on the law governing the crime charged, and such explicit definitions of such crimes, the object of the law was met, and no further instruction was necessary. It is not enough to say that the jury, if it had been permitted by the instruction offered, might have found for the lesser crime, in its humane reluctance to find a verdict for the higher crime; for this would defeat the ends of justice and the purpose of the law, as it is as much the object of the law to punish the guilty as to protect the innocent. The great consideration is the fairness of the trial to both the state and the accused. The court instructed the jury on the crime charged, and we think the instruction was so explicit that the jury could not fail to comprehend its duties in the premises, and the defendant's rights. After reading the information to the jury, the court said:

"Under this information, if the evidence so warrants, you may find the defendant guilty of murder in the first degree, or guilty of murder in the second degree, or you may find him not guilty. The crimes I have mentioned are defined by our statutes as follows: 'Every person

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who shall purposely and in his deliberate and premeditated malice kill another, shall be deemed guilty of murder in the first degree.' I instruct you, gentlemen of the jury, that the law presumes the defendant to be innocent; and in order to convict him of either of the crimes I have mentioned, every fact necessary to constitute such crime must be proved beyond a reasonable doubt, and if the jury entertains any reasonable doubt, on any single fact or element necessary to constitute the crime, it is your duty to give the defendant the benefit of such doubt and acquit him."

These definitions were in the language of the statute, and, if the jury understood the ordinary meaning of ordinary language, it understood the instruction. But the court, out of an abundance of caution, proceeded in instruction No. 5 to define the words of the statute as follows:

"The word 'purposely' defines itself. It simply means an act done with the purpose or intent of doing that act.

"The word 'deliberate' means the mental state or condition of the mind in considering, weighing, and deliberating upon the motive which prompts or induces a certain act or line of action.

" 'Premeditation' is the mental operation of thinking over an act or line of action already decided in the mind before carrying the act or line of action into execution.

" 'Malice' is not confined to ill will towards an individual, but it is also intended to denote an action flowing from any wicked and corrupt motive. A thing done with a wicked mind, and attended with such circumstances as plainly indicate a heart regardless of social duties and fully bent on mischief, indicates malice within the meaning of the law. Malice may be either expressed or implied. Express malice may appear from all the evidence and circumstances of the alleged killing; implied malice may appear where there is no just cause or excuse of the alleged killing."

Then, after further pertinent instructions and a further

plain recital of the facts which were necessary to constitute either murder in the first or second degree, the jury was instructed that, if it was not satisfied beyond a reasonable doubt that the defendant was guilty of either of the crimes defined, it must return a verdict of not guilty. We are satisfied that the jury was in no measure misled by the instructions or want of instructions, that it was properly instructed on the law governing the crime charged, and that no error was committed by the refusal of the court to give the instructions asked.

The judgment is affirmed.

FULLERTON, C. J., and MOUNT, HADLEY, and ANDRES, JJ., concur.

[No. 4865. Decided December 11, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. FRANK
STENTZ, *Appellant*.¹

HOMICIDE—FLIGHT—EFFECT OF—INSTRUCTIONS—ASSUMPTION OF FACT. In a prosecution for a homicide an instruction as to the effect of the flight of a person immediately after the commission of the offense, "if you find from the evidence that the defendant fled," etc., does not assume the fact that the defendant fled.

SAME—WEIGHT TO BE GIVEN TO FACT OF FLIGHT. Such an instruction properly leaves to the jury the weight to be given to the circumstance of flight.

SAME—SUFFICIENCY OF EVIDENCE AS TO FLIGHT. There is sufficient evidence to warrant an instruction as to the circumstance of defendant's flight where, after running down and killing a bicyclist in a public road in the day time, defendant changed his course into an obscure road without stopping to render assistance, sought to avoid meeting any one, and separated from his companions, and avoided the town into which he was going and was making his way away from home at the time of his arrest.

HOMICIDE—EVIDENCE OF GOOD CHARACTER—INSTRUCTIONS. Instructions that evidence of good character for peace and quiet

¹Reported in 74 Pac. 588.

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Citations of Counsel.

ness is material to a defense where the accused is on trial for a homicide, are properly refused when they further clearly intimate that the jury might acquit on such evidence even though they find from the evidence that he was guilty; also when they are argumentative, and attempt to give the reasons for the law.

SAME. It is sufficient to instruct that evidence of good character should be considered as tending to establish a defense, but that it could not avail if all the evidence satisfied the jury beyond a reasonable doubt as to his guilt.

INVOLUNTARY HOMICIDE—ACCIDENTAL KILLING IN ATTEMPTING TO AVOID COLLISION—UNLAWFUL ACT OF RECKLESS DRIVING IN STREET—INSTRUCTIONS. In a prosecution for involuntary homicide where the evidence tended to show that defendant ran down and killed a bicyclist while wantonly and recklessly driving upon the public streets in such a manner as to endanger the lives of others, a requested instruction as to the effect of an accidental killing while attempting to avoid a collision is properly qualified by adding that it would be immaterial if the death resulted from such unlawful act of the defendant, since it would be no excuse that defendant tried to avoid the accident after it was too late.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered March 16, 1903, upon a trial and conviction of the crime of involuntary homicide. Affirmed.

Sullivan, Nuzum & Nuzum, for appellant. Upon the point that it was error to refuse the requested instruction as to the defendant's good character, counsel cited: *Fields v. State*, 47 Ala. 603, 11 Am. Rep. 771; *Eddington v. United States*, 164 U. S. 361, 41 L. Ed. 467; *Daniels v. State*, 2 (Pen.) Del. 586, 48 Atl. 196; *State v. Van Kuran*, 25 Utah 8, 69 Pac. 60; *Commonwealth v. Leonard*, 140 Mass. 473, 4 N. E. 96; *Hanney v. Commonwealth*, 116 Pa. St. 322, 9 Atl. 339; *State v. Lindley*, 51 Iowa 343, 1 N. W. 484, 33 Am. Rep. 139; *State v. Northrup*, 48 Iowa 583, 30 Am. Rep. 408; *Rowe v. United States*, 97 Fed. 779; *People v. Jassino*, 100 Mich. 536, 59 N. W. 230.

Horace Kimball and Miles Poindexter, for respondent. It was not error to refuse the instruction requested as to defendant's good character. *Springfield v. State*, 96 Ala. 81, 11 South. 250, 38 Am. St. 85; *Pate v. State*, 94 Ala. 14, 10 South. 665; *Johnson v. State*, 94 Ala. 35, 10 South. 667; *Williams v. State*, 52 Ala. 412; *State v. Vance*, 29 Wash. 435, 70 Pac. 34.

MOUNT, J.—This is a second appeal in this case. When the case was here before (30 Wash. 142, 70 Pac. 241), it was reversed and remanded to the lower court for a new trial. It has since been retried, and a verdict of guilty as charged again returned. The only errors alleged are upon the instructions of the trial court given at the last trial. Upon the question of flight the court instructed the jury as follows:

“(4.) The flight of a person immediately after the commission of a crime, if you find from the evidence that the defendant fled, or after a crime has been committed with which he is charged, is a circumstance in establishing his guilt not sufficient in itself to establish guilt, but a circumstance which the jury may consider in determining the probabilities for or against him—the probabilities of his guilt or innocence. The weight to which that circumstance is entitled is a matter for the jury to determine, in connection with all the facts called out in the case.”

It is claimed, (1) that this instruction assumes the fact that defendant fled; (2) that the court did not instruct the jury as to the weight to be given to the fact of flight; (3) that there is no evidence in the case to justify the instruction. None of these contentions can be sustained. The effect of the instruction is to tell the jury that, if they found as a matter of fact that the defendant fled after the commission of the crime with which he was charged, then such flight was a circumstance not in itself, sufficient to

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establish guilt, but which the jury may consider in determining that question; the weight of which circumstance is for the jury to determine, in connection with all the facts. There is no assumption here that the defendant fled, but the jury are told that, if they found that he did flee, then they should weigh this fact as a circumstance in the case. Upon the weight they should give this circumstance the court properly instructed the jury.

The evidence also clearly justifies an instruction upon the question. It shows conclusively that, after the defendant had run down an unoffending bicyclist upon a broad public highway in full daylight, and killed him, defendant, instead of keeping the main public road, turned off into an obscure road and sought to avoid meeting or being recognized by other persons, and sought to avoid the town into which he was going, and also changed his course from toward his home, and was making toward the city of Spokane when he was arrested. His companions also separated from him and left him; none of them stopped or went back to render assistance to the man whom they had killed, and who they must have known was seriously, if not fatally, injured. Appellant requested the court to give the following instructions:

"(7.) I instruct you as a matter of law, should you find from the evidence in this case that prior to the accident mentioned in the information, this defendant bore in the neighborhood in which he lived, a good reputation for peace and quietness, and as a law-abiding citizen, that such fact, if you find that such fact is proven by the evidence in this case, may of itself be sufficient to generate in your minds a reasonable doubt upon which you may acquit the defendant.

"(8.) If you find from the evidence in the case that the defendant has proved a good character as a man of peace and quietness and as a law-abiding citizen, the law

says that such good character may be sufficient to create a reasonable doubt of guilt, although no such doubt would have existed but for such good character.

"(10.) You are further instructed that good character is an important fact with every man, and never more so than when he is put on trial charged with an offense which is rendered improbable in the last degree by a uniform course of life wholly inconsistent with any such crime. There are cases (and it is for you to say what weight it shall have in this case) where it becomes the man's sole dependence, and yet may prove sufficient to outweigh evidence of the most positive character. The most clear and satisfactory cases are sometimes rebutted by it, and a life of unblemished integrity becomes a complete shield of protection against what may otherwise appear to be proof of guilt. Good character will not only raise a doubt of guilt which may not otherwise exist, but it may bring conviction of innocence. In every criminal trial it is a fact which the defendant is at liberty to put in evidence, and being in, the jury have a right to give it such weight as they think it entitled to."

These requested instructions were refused by the trial court. In so far as these instructions state that evidence of good character for peace and quietness is material to a defense where the accused is on trial for crime, they are no doubt correct. The first two of these instructions, however, intimate very clearly that, if the jury find the defendant had previously borne a good reputation for peace and quietness and as a law abiding citizen, they may acquit him, even though they find from the evidence that he was guilty. Such is not the rule. Good men may be convicted when they are guilty. The last instruction is argumentative. It not only states the correct rule, but it states the reasons for it which are not necessary to be given to the jury. Courts in this state must declare the law. They

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need not give the reasons for it, or argue the law to the jury. The trial judge instructed the jury upon this question as follows:

"Upon the question of the good character of the defendant for being a peaceable and law-abiding citizen, the court instructs the jury that this evidence should be considered by the jury as tending to establish a defense. If, however, the jury should be satisfied of the guilt of the defendant beyond a reasonable doubt, after a full consideration of all the evidence in the case, including the evidence in regard to the character of the defendant for being a peaceable and law-abiding citizen, then, though the jury might believe the defendant had a good character for being a peaceable, law-abiding citizen before the charge for which he is now being tried, such evidence of good character would not avail the defendant as a defense and entitle him to an acquittal."

This instruction was sufficient because it states the substance of the requested instruction and correctly states the law.

Defendant requested the following instruction:

"You are further instructed that, if you find from the evidence in this case that the deceased came to his death by the honest mistake of the defendant in an honest endeavor to avoid a collision, then and in that event such killing would be accidental, and not criminal, and your verdict should be not guilty.

The court gave the instruction as follows:

"You are further instructed that, if you find from the evidence in the case that the deceased came to his death by the mutual mistake of the deceased and the defendant in the honest endeavor to avoid a collision, both on the part of the deceased and the defendant, then in that event such killing would be accidental, and not criminal, and your verdict should be not guilty. In connection with that instruction, gentlemen of the jury, I instruct you that, if the defendant was at the time alleged in this information engaged in an unlawful act, to wit, the act of driving

horses and a wagon upon the public highway in such a manner as to endanger the lives and persons of others, and such unlawful act resulted in the killing of the person named in the information mentioned, it would then be immaterial whether the killing was accidental or intentional. The defendant would be guilty."

This instruction as given was certainly as favorable to the defendant as the facts warranted. The information charged the defendant with unlawfully, wantonly, and recklessly driving his team and wagon upon the public highway in a manner likely and calculated to endanger the lives of persons thereon, and that defendant did so run over and upon the deceased, and the proof tended to show these facts. If the defendant was unlawfully, wantonly, and recklessly driving upon the public highway, and thereby ran down and killed one who had a right to be there, the fact that the defendant, when it was too late, tried to avoid the accident, would not excuse him. If there was error at all in the last instruction given, it is error against the state and not against the appellant.

The instructions as a whole fairly and correctly stated the law of the case to the jury. Finding no error, the judgment is affirmed.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

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Syllabus.

[No. 4802. Decided December 12, 1903.]

SHAMGAR MORRIS *et al.*, Respondents, v. HEALY LUMBER
COMPANY, Appellant.¹

33	451
34	600
35	451
36	886

FORCIBLE ENTRY AND DETAINER—SUMMONS—WHEN RETURNABLE. Bal. Code, § 5532 providing that a summons in forcible entry shall be returnable at a date designated therein, which shall not be less than six nor more than twelve days from its date, the date referred to applies to the date of the service of the summons, and not to the date of its issuance endorsed thereon; hence a summons issued February 2, returnable February 18, and served February 9, is sufficient.

APPEARANCE—SPECIAL OR GENERAL. After the overruling of a motion to quash the service of a summons, an answer filed without any mention of the previous special appearance, is a general appearance in the case, under Bal. Code, § 4886.

FORCIBLE ENTRY AND DETAINER—HOLDING OVER AFTER EXPIRATION OF TERM—EMINENT DOMAIN—PENDENCY OF CONDEMNATION PROCEEDINGS AS A DEFENSE. In an action for unlawful detainer, a defendant corporation holding over after expiration of a lease can not justify its possession, or ask a suspension of the judgment, by setting up the institution of proceedings for the appropriation of the land which are still pending, and by the offer to give security until the same is determined.

SAME—NOTICE TO QUIT. In forcible entry and detainer, where the answer does not deny that a lease for a definite term had expired, notice to quit is not required under Bal. Code, § 5527.

SAME—DUE PROCESS OF LAW. The forcible entry and detainer act does not violate the fourteenth amendment to the constitution of the United States, prohibiting the states from depriving a person of property without due process of law.

PLEADINGS—MOTION FOR JUDGMENT. Where the complaint is sufficient and the answer contains no legal defense, judgment on the pleadings is properly entered for the plaintiff.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 11, 1903, upon granting plaintiffs' motion for judgment on the pleadings. Affirmed.

¹Reported in 74 Pac. 662.

Preston, Carr & Gilman, and *Hoyt & Haight*, for appellant. (1) A subsequent general appearance does not waive the objection to the jurisdiction made on the motion to quash. *Woodbury v. Henningsen*, 11 Wash. 12, 39 Pac. 243. A summons to appear at a later day than that permitted by Bal. Code, § 5532, is void. 20 Enc. Plead. & Prac. 1161; *Hisler v. Carr*, 34 Cal. 645; *Rattan v. Stone*, 4 Ill. (3 Scam.) 540; *Youngs v. Youngs*, 130 Ill. 230, 22 N. E. 806, 17 Am. St. 313; *Ohio, etc. R. Co. v. Hanna*, 16 Ind. 391; *Fuller v. Indianapolis etc. R. Co.*, 18 Ind. 91; *Pantall v. Dickey*, 123 Pa. St. 431, 16 Atl. 789; *Haws v. Clark*, 37 Iowa 356; *Leigh v. Alpaugh*, 24 N. J. L. 629; *Fernekes v. Case*, 75 Iowa 152, 39 N. W. 238. The same is true if the return is sooner than allowed by statute. *Manville v. Smelting Co.*, 17 Fed. 126; *Sanders v. Rains*, 10 Mo. 771; *Crowell v. Galloway*, 3 Neb. 218; *Hunsacker v. Coffin*, 2 Ore. 109; *Butler v. Lowry*, 3 Vt. 14.

(2) The defendant is entitled to possession during condemnation proceedings. The rule in courts of law is to suspend the entry of judgment in an ejectment case until the condemnation proceedings are disposed of. *Owen v. St. Paul etc. R. Co.* 12 Wash. 313, 41 Pac. 44; *Conger v. Burlington etc. R. Co.*, 41 Iowa 419; *Allegheny Valley R. Co. v. Colwell* (Pa.), 15 Atl. 927; *Jacksonville etc. R. Co. v. Adams*, 28 Fla. 631, 10 South. 465; *Pittsburg etc. R. Co. v. Jones*, 59 Pa. St. 433; *Ritchie v. Kansas etc. R. Co.* 55 Kan. 36, 39 Pac. 718; *Illinois Cent. R. Co. v. Le Blanc*, 74 Miss. 650, 21 South. 760. And in equity, an injunction is denied or suspended until the condemnation suit is tried out. *Colby v. Spokane*, 12 Wash. 690, 694, 42 Pac. 112; *Patton v. Olympia etc. Co.*, 15 Wash. 210, 46 Pac. 237; *Harrington v. St. Paul etc. R. Co.*, 17 Minn. 215; *Jacquelin v. Manhattan R. Co.*, 29 N. Y. Supp. 1113;

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Willamette Iron Works v. Oregon R. & Nav. Co., 26 Ore. 224, 37 Pac. 1016.

(3) The fact that defendant's possession was lawful under the condemnation proceedings entitled it to notice to quit. *Smith v. Chicago etc. R. Co.*, 67 Ill. 191.

(4) The arbitrary nature of the forcible entry act has been commented on in holding that it did not violate the state constitution. *State ex rel. German etc. Soc. v. Prather*, 19 Wash. 336, 53 Pac. 344, 67 Am. St. 729. Its provisions for restitution before judgment (§§ 5534-5) violate the federal constitution. *Ash v. Cummings*, 50 N. H. 591; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220.

Walter S. Fulton and *Vince H. Faben*, for respondents.

DUNBAR, J.—This is an action under the forcible entry and detainer statute for the restitution of certain lands claimed by the plaintiffs to be unlawfully withheld from them by the defendant. Defendant moved to quash on the ground of the invalidity of the writ; its motion was denied and defendant excepted.

The defendant, for answer to the complaint, denied portions of the complaint, and alleged the existence of a lease of the premises in question, under the provisions of which lease the defendant was entitled to possession until the 23d of January, 1903. The answer further alleged, that the defendant was engaged in a general logging and lumbering business, including the clearing out and improving of rivers and streams for the driving, holding, and delivering of logs and other timber products thereon, and engaged in said business on and in the vicinity of the land described in the complaint; that all the conditions of the lease on the part of the defendant to be performed had

been performed by the defendant; that defendant had constructed skid roads, rollways and dams, watercourses and watergates, houses for its employees, machinery, and all the equipment of an efficient logging plant and camp for the removal of timber, purchased by defendant of plaintiffs, several hundred thousand feet of which timber was still standing; that, until shortly prior to the commencement of the action, defendant expected to arrange with plaintiffs on terms mutually satisfactory for the use of that portion of the lands and waters occupied by said logging plant that was situated within the area described in the complaint; that, finding that no such arrangement could be made, the defendant, on the 22d day of January, 1903, commenced an action in the superior court of King county against said plaintiffs for the condemnation of said lands and waters and rights, under the act approved March 14, 1899, entitled, "An act providing for condemnation of right of way for logging purposes and for conveying timber products and declaring an emergency." The answer further set forth a copy of the complaint filed by the defendant, the Healy Lumber Company, as plaintiff in the condemnation suit; and further alleged, that the lands and waters occupied by this logging plant were necessary to the removal of the timber aforementioned; that the eviction of the defendant from said area during the pendency of the condemnation proceedings would necessitate the removal of the logging camp and the destruction of a large part thereof, and would put the defendant to great expense; and that the defendant was willing and ready to compensate plaintiff fully for the use of said lands and for the value thereof; and that defendant tendered to the plaintiffs such security as to the court might seem just, for the payment of all damages for the use of said land sought to

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be condemned, and for the value of the same, as determined in said condemnation proceedings. The reply denied the averments of the answer except as to the existence of the lease and the condemnation action. The plaintiffs moved for judgment on the pleadings, which motion was granted by the court over the objection of defendant.

The appellant's first contention is, that the court erred in overruling appellant's motion to quash the summons; that the original summons was dated the 2d day of February, 1903, and was made returnable on Wednesday, the 18th day of February, 1903; that, under the provisions of § 5532, Bal. Code—that upon filing the complaint a summons must be issued thereon returnable at a date designated therein, which shall not be less than six nor more than twelve days from its date—the summons in this case was insufficient to give the court jurisdiction.

The summons has indorsed upon it the date mark of February 2, 1903, and it is true that the statute requires that the summons shall be returnable at a date designated therein, which shall not be more than twelve nor less than six days from the date of the summons; but this summons was served on the 9th day of February, 1903, requiring the appellant to appear on the 18th day of February, which was a period, as may be seen, not less than six nor more than twelve days from this date. We think a reasonable construction of this statute is that the date referred to is the date of the service upon the defendant, and that the requirement which the law concerns itself about is the requirement that the time for answering, which is imposed upon the defendant, shall not be more than twelve nor less than six days from the time when he receives the notice. There is no requirement of the statute in relation to a date being indorsed upon the summons. The essential thing is

the date of the service, and we think it would be entirely too technical to hold that the appellant did not receive the notice in this case which is required by statute, and that he did not receive the protection in relation to time which the statute accords him.

In addition to this, an answer was filed several days after the motion to quash was overruled, in which no mention is made of a special appearance, and § 4886, Bal. Code, provides that a defendant appears in an action when he answers, demurs, makes an application for an order therein, or gives a plaintiff written notice of his appearance. After appearance defendant is entitled to notice of all subsequent proceedings, but when a defendant has not appeared, service of notice or papers in the ordinary proceeding in an action may not be made upon him. Every such appearance made in an action shall be deemed a general appearance, unless the defendant, in making the same, states that the same is a special appearance. We think that in any event the motion was properly overruled.

The next contention is that it is a general rule of courts of justice, whether sitting as courts of law or courts of chancery, to permit the state, or any person or corporation to whom the powers of eminent domain have been delegated, if in possession of the tract while condemnation proceedings are pending, to remain in possession until the expiration of the proceedings, upon proper security to the persons whose land is the subject of the condemnation proceeding. Many cases are cited in support of this contention.

Without passing upon the question assumed by this assignment of error, viz., that this defendant is possessed of the powers of eminent domain, the cases cited by the appellant seem to us not to be in point, as they are not cases

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which involved the construction of the statute of forcible detainer, which has always been held to be a law for the summary determination of the right of possession. Bal. Code, § 5527, provides, that a tenant of real property for a term less than life is guilty of unlawful detainer when he holds over or continues in possession, in person or by subtenant, of the property or any part thereof, after the expiration of the term for which it is let to him; that in all cases where real property is leased for a specified term or period, by express or implied contract, whether written or by parol, the tenancy shall be terminated without notice at the expiration of such specified term or period. It would seem that, if corporations are to be subjected to the provisions of the law as are individuals, the statute is not susceptible of construction. This court held in *Phillips v. Port Townsend Lodge*, 8 Wash. 529, 36 Pac. 476, that equitable defenses could not be interposed under the complaint drawn under the forcible entry and detainer acts.

"In our judgment," said the court, "the demurrer should have been sustained. The very object the legislature had in view in enacting the statute under which the appellants were proceeding was to afford a summary and adequate remedy for obtaining possession of premises withheld by tenants in violation of the covenants of their lease, and this object would be entirely frustrated if tenants were permitted to interpose every defense usual or permissible in ordinary actions at law. The statute prescribes that a tenant is guilty of unlawful detainer after default in the payment of rent pursuant to the lease or agreement under which the property is held, . . . And when these facts are made to appear to the satisfaction of the court or jury upon the trial, the landlord is entitled to judgment for restitution of the premises, and also to judgment declaring the forfeiture of such lease or agreement, together with damages and the rent found due. In such proceedings counterclaims and offsets are not available;"

citing many cases in support of the announcement. Such has been the uniform holding of this court from that time up to and including the recent opinion of this court in *Gore v. Altice*, ante, p. 335, 74 Pac. 556.

It is insisted by the appellant that it did not attempt by its answer to interpose an equitable defense, but simply to state a right of the defendant which will justify the court in suspending judgment until the condemnation proceeding was ended. But if the matters and things set up in the defense do not constitute an equitable defense, we are at a loss to know what kind of a defense it is. It cannot be claimed under the contract of lease that the defendant had any legal defense, or was entitled to retain possession of the lands after the term of its tenancy had expired, under any legal principle. If it was a defense at all, it was certainly of an equitable nature, although it might be very seriously doubted from a purely equitable standpoint whether the defendant should have the right to protract the term of its lease by the method of instituting a condemnation proceeding, which might or might not eventuate in its favor. And even if it did, it occurs to us that its rights should only commence to operate in its favor after they had been obtained by successful legal proceedings.

It is also contended that appellant was entitled to be served with a notice to quit, the complaint alleging notice and the answer denying it. But the answer does not deny the allegations of the complaint that the premises had been leased for a definite period, and that said period had expired; and, under the provisions of § 5527 above quoted, no notice, under such circumstances, is required.

The last contention—that the forcible entry and detainer act is violative of the provisions of the fourteenth amendment to the constitution of the United States, which pro-

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hibits the state from depriving any person of life, liberty, or property without due process of law—was passed upon by this court contrary to appellant's contention in *State ex rel. German etc. Soc. v. Prather*, 19 Wash. 336, 53 Pac. 344, 67 Am. St. 729. The contention there was that it was in violation of § 1 of art. 3 of the constitution of the state. But this involved substantially the provisions of the federal constitution above referred to. We are satisfied with the ruling in that case, and do not think it necessary to again enter into a discussion of the questions involved.

The complaint being a good complaint under the statute, and there being no legal defense to the allegations therein contained, the motion for judgment upon the pleadings was properly granted. Affirmed.

HADLEY and MOUNT, JJ., concur.

FULLERTON, C. J., and ANDERS, J., concur in the result.

[No. 4768. Decided December 12, 1903.]

W. E. THOMAS *et al.*, Respondents, v. JOHN R. PRICE,
Appellant.¹

33	459
37	227

PLEADINGS—AMENDMENT—LIMITATION OF ACTIONS—STATUTE NOT UNCONSCIONABLE DEFENSE—SETTING UP IN AMENDED PLEADING. The statute of limitations is not an unconscionable defense, and the allowance of an amended pleading for the purpose of setting it up is not to be discriminated against, but should be treated as any other defense.

SAME. Great latitude is allowed in the amendment of pleadings, and it is not error to allow a trial amendment pleading the statute of limitations to a note, where the defendant was not surprised and made no application for a continuance.

¹Reported in 74 Pac. 563.

Appeal from a judgment of the superior court for Spokane county, Richardson, J., entered January 20, 1903, upon the verdict of a jury rendered in favor of the plaintiff. Affirmed.

Adolph Munter, for appellant. To the point that the plea of the statute of limitations will not be received with favor by way of amendment, after the period of pleading it as a matter of right has expired, counsel cited. *Bliss*, Code Pleadings, § 431 (2d ed.); *Coit v. Skinner*, 7 Cowen 400; *Jackson v. Varick*, 2 Wend. 294; *Wolcott v. McFarlan*, 6 Hill 227; 13 Enc. Plead & Prac. 210. Failure to plead is deemed a waiver, or election to rely on other defenses. *Morton v. Bartning*, 68 Cal. 306, 9 Pac. 146; *Kelly v. Kriess*, 68 Cal. 210, 9 Pac. 129; *Clinton v. Eddy*, 54 Barb. 54. Where the defect appears on the face of the complaint, the defense of the statute is waived by failing to demur. *Spaur v. McBee*, 19 Ore. 76, 23 Pac. 818; *Roche v. Spokane County*, 22 Wash. 121, 61 Pac. 59.

Ernest C. Macdonald, for respondents.

DUNBAR, J.—This is an action on a promissory note given by defendant to plaintiffs on September 28, 1901, for \$700, payable thirty days after date. Defendant denied plaintiffs' ownership of said note, and also pleaded by way of counterclaim the ownership of a note made by plaintiffs severally and jointly with one J. E. McGinnis on February 13, 1903, bearing interest at the rate of five per cent per month, payable to the order of G. M. Nethercutt, and on July 30, 1901, sold and assigned by said Nethercutt to defendant; on which note certain payments were in the answer alleged to have been made, and on which, at the time of the commencement of this action, there was due a balance of \$149.85 in excess of the note owned by plaintiffs, for which amount defendant asks judgment.

Upon the trial, plaintiffs proved the execution of their note by defendant, and ownership thereof by plaintiffs, and rested. After the introduction of the note which was pleaded as a counterclaim, plaintiffs asked permission to amend their reply by pleading the statute of limitations against the note set out in the cross-complaint. This permission was granted over the defendant's objection. The cause went to trial; proof to the satisfaction of the jury was made that the last payment, which would have prevented the statute of limitations from running, was not made as a payment on the note, but was a payment for notarial services. The jury brought in a verdict for plaintiffs, and, after defendant's motion for a new trial had been overruled, judgment was rendered against defendant, from which judgment this appeal is taken; and the only error assigned is that the court erred in permitting the amendment to the reply by pleading the statute of limitations at the time such permission was given.

Great latitude in the amendment of pleadings is conferred upon the trial court by the statute, and the appellate courts in all jurisdictions have been liberal in construing this power. It is claimed by the appellant that one of the well defined limitations is that there must not be an entire departure from the original cause of action and defense, and that it must be done in furtherance of justice. The basis of appellant's contention, and the only ground upon which it can be sustained, is that the statute of limitations is an unconscionable defense. But, in accordance with the weight of authority, this court has held that it is a defense which litigants have a right to plead, and that in the trial of a cause it should not be discriminated against, but should be treated as any other defense. In *Morgan v. Morgan*, 10 Wash. 99, 38 Pac. 1054, it was

held not an abuse of discretion for the court, after a hearing of the cause, to allow an amendment correcting a mistake, although the equities of the case might have been in favor of the plaintiff. This court, after stating the ground of appellant's contention—that it was an abuse of discretion to permit the amendment, and that amendments should only be allowed in aid of justice, not of injustice—said:

“A number of authorities are cited as sustaining the proposition that the amendment should not have been permitted. But we think that the action of the lower court was right in the premises. . . . Under the weight of the authorities, the statute of limitations is not, now at least, generally regarded as an unconscionable defense. We regard this as so well settled that we deem a citation of many authorities unnecessary, but refer to *Wood v. Carpenter*, 101 U. S. 135 [25 L. Ed. 807],”

where that court vigorously laid down the rule that statutes of limitation are vital to the welfare of society and are favored in the law, giving cogent reasons for such announcements; citing also *Barnett v. Meyer*, 10 Hun 109, where the court said:

“Whatever may have been the earlier doctrine on the subject of what are called unconscionable defenses, it no longer prevails. The rules which govern amendments are now to be regarded without reference to the character of the defense.”

The same rule was announced in *Roche v. Spokane County*, 22 Wash. 121, 60 Pac. 59, where the trial court permitted the defendant to file a special demurrer raising the defense of the statute of limitations, after a general demurrer had been overruled and after the same defense had been, on motion, stricken from defendant's answer. Also *McClaine v. Fairchild*, 23 Wash. 758, 63 Pac. 517, where the court, after stating the contention of the appel-

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lant that it was particularly insisted that the plea of the statute of limitations was not viewed favorably, said: "But such view of the statute of limitations is not now, we think, usual or supported by the weight of authority;" citing with approval *Morgan v. Morgan, supra*, and the cases cited therein; and also 13 Enc. Plead. & Prac., p. 209, where it is said:

"Although according to some authorities the plea of limitation is classed among those not deemed meritorious, yet the statute of limitations is not now generally regarded as an unconscionable defense."

There is no claim that the defendant was surprised by the proffer of this plea, and, in any event, no motion was made for a continuance, and we held in *Daly v. Everett Pulp etc. Co.*, 31 Wash. 252, 71 Pac. 1014, that an action of the court in allowing, on an oral motion, an amendment to a pleading on the date of a trial, without an affidavit showing a good cause therefor, and without notice to the adverse party, was not reversible error, under the provisions of the statute authorizing the court to allow amendments to pleadings where the record did not show that he was injured by the amendment and unprepared with testimony to meet the issue thereby tendered. The court, after citing the case of *Barnes v. Packwood*, 10 Wash. 50, 38 Pac. 857—where the court permitted a fourth answer to be filed, and where this court had said that "the court having such a large discretion, under our law and practice, in matters of amendments, we do not think we would be justified in reversing the case for this reason"—proceeds to say:

"The record does not disclose any claim on the part of appellant that he was really injured by the amendment, and unprepared with testimony to meet any issue tendered thereby. No application for continuance of the trial on

the ground of surprise or inability to produce testimony is shown. If such had been made to appear, no doubt the trial court would have granted the amendment upon such terms as would have fully protected any rights shown to be jeopardized by permitting the amendment at that time."

What was said there may be appropriately applied to this case. No prejudicial error appearing, the judgment is affirmed.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, J.J., concur.

[No. 4620. Decided December 12, 1903.]

CHARLES T. PETERSON, *Appellant*, v. PHILADELPHIA
MORTGAGE & TRUST COMPANY *et al.*, *Respondents*.¹

EJECTMENT—DEFENSES—PLEADING—MORTGAGEE IN POSSESSION. In an action to recover possession of real estate, an answer showing that the defendant is a mortgagee in possession with the consent of the owners of the legal title and under a written assignment of the rents for the purposes of security until arrears are paid, and that the same are not paid, and that plaintiff is a subsequent purchaser with notice, shows a rightful possession and is not demurrable.

SAME—TRIAL BY JURY—EQUITABLE DEFENSES TO LEGAL ACTION. Such an answer raises equitable defenses to be first tried by the court, and plaintiff is not entitled to a jury trial.

MORTGAGEE IN POSSESSION—CONTRACT FOR APPLICATION OF RENTS—CONSTRUCTION. Where the owners of mortgaged premises surrendered possession thereof under a written assignment of the rents to be applied (1) to the repayment of disbursements for insurance, taxes, and repairs paid or to be paid by the mortgagee, and (2) to the payment of all arrears of interest "due," the agreement is to be construed as prospective and covers the interest subsequently falling due, in view of the circumstance that the owners suffered the mortgagee to remain in possession

¹Reported in 74 Pac. 585.

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and apply the rents to subsequent interest for years after the agreement was made.

EJECTMENT—DEFENSES—MORTGAGEE IN POSSESSION—BONA FIDE PURCHASER—LIMITATION OF ACTIONS. In an action by a vendee of the mortgagors to recover possession of premises from a mortgagee in possession, it is not error to refuse leave to file an amended complaint setting up the statute of limitations to the defense of the mortgage and possession thereunder, since the open possession of the mortgagee was sufficient to put the plaintiff upon inquiry as to the rights claimed and he can not claim to be a bona fide purchaser without notice.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered November 15, 1902, dismissing an action of ejectment, upon a trial before the court without a jury of equitable issues raised by the answer. Affirmed.

Charles T. Peterson, Thomas Carroll, and James F. O'Brien, for appellant.

B. F. Heuston, for respondents.

PER CURIAM.—On the 8th day of March, 1901, Charles T. Peterson, appellant, filed in the superior court of Pierce county his complaint against respondents Samuel Isaacs, Charles T. Brackett, and William C. Black, alleging that he (Peterson) was, on the 23rd day of January, 1901, has been ever since, and is, the owner in fee, and entitled to the possession, of lot 6, block 1304, in the city of Tacoma, claiming damages in the sum of \$175 per month for each and every month said property has been withheld from him. Said respondents, answering this complaint, alleged that they held such premises as the tenants of the Philadelphia Mortgage & Trust Company, a corporation, and prayed for the substitution of that corporation as a party defendant, and that the action proceed as if it had been originally commenced against that corporation. On the

13th day of April, 1901, the order of substitution was accordingly made.

Thereafter respondent Philadelphia Mortgage & Trust Company answered, and denied that appellant was entitled to the possession of said property, and denied the wrongful withholding thereof and the damages alleged in the complaint, and alleged two affirmative defenses; in the first of which it claimed the right of possession by virtue of a certain mortgage executed by former owners of the premises to such company on November 1, 1892, in connection with a certain written agreement made July 31, 1894, by Ida Geiger and her husband, Joseph Geiger, the then owners of the legal title to such premises, claiming title thereto by certain mesne conveyances from the original mortgagors, Charles Drury and Nettie Drury (husband and wife). A copy of this agreement is attached to the answer as an exhibit, and set forth in finding of fact No. 10 of the trial court, and is as follows:

"Know all men by these presents, that Ida Geiger and Joseph Geiger, her husband, both of Lake Park, Tacoma, in consideration of the sum of One Dollar paid to them by the Philadelphia Mortgage & Trust Company, of Philadelphia, Pa., do hereby assign to the said Philadelphia Mortgage & Trust Company the whole rents of their property, lots six (6) and seven (7) in block thirteen hundred and four (1304), in the city of Tacoma from and after the first day of September, 1894, said rents to be applied in the first place in repayment to the said Philadelphia Mortgage & Trust Company, of all insurance, taxes, or other disbursements paid, or to be paid, by said company on account of said property, in virtue of the powers contained in two mortgages thereon for the sum of Sixteen Thousand Dollars (\$16,000) each, given by Charles Drury and wife to the said Philadelphia Mortgage & Trust Company, dated the 1st, and recorded the 15th, both days of November, 1892; and, in the second

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place, in payment to the said Philadelphia Mortgage and Trust Company of all arrears of interest due upon two mortgage notes for sixteen thousand dollars each, by the said Charles Drury and wife, secured by the above mentioned mortgages: Provided that as soon as said insurance, taxes and other disbursements, and said arrears of interest have been fully paid to the said Philadelphia Mortgage & Trust Company, the said rents shall thereupon be re-assigned to the said Ida Geiger. Dated at Tacoma, the 31st day of July, 1894.

“(Signed) Ida Geiger,
“Joseph Geiger.”

It is further alleged, that on or about September 1, 1894, the Geigers surrendered possession of said lot 6 to the mortgage and trust company for the purpose of securing the performance of this contract on their part; that such company still holds possession of the premises in question pursuant to this agreement; that, thereafter and prior to the commencement of the present action, this company leased the premises to respondents Isaacs, Brackett, and Black. There is attached to this defense certain exhibits purporting to be schedules of (1) taxes paid, (2) insurance, (3) rents received, and (4) other disbursements for repairs, water rent, *et cetera*; and it is alleged that the rents received at the commencement of this action were insufficient to liquidate the accrued interest on the mortgage and items of disbursements, as per exhibits attached and made a part of the answer, under the above contract.

The second affirmative defense, designated in the pleading as “a third and separate answer,” incorporates and adopts all the allegations of the preceding defense by express reference thereto, avers matters by way of estoppel, and further avers, that said company has been in the open and notorious possession of the above premises since September 1, 1894; that, if appellant has any estate or interest

therein, the same was derived through the Geigers, the parties to the above agreement, subsequent to its execution and to the surrender of possession of the property to the respondent corporation, with notice of its equities in and to such property.

The appellant interposed general demurrers to each of the separate defenses, which were overruled by the trial court. Appellant thereafter filed his reply, putting in issue the material allegations of each affirmative defense; admitting, however, that about the 31st day of July, 1894, Ida Geiger and Joseph Geiger assigned to respondent Philadelphia Mortgage & Trust Company the rents to be collected from the premises described in plaintiff's complaint, for the purpose of securing and paying respondent for certain moneys paid by respondent for insurance and taxes, and also for certain interest then due. Appellant demanded a jury trial, under the issues raised by the pleadings, which was refused by the superior court, and to which ruling appellant excepted. A trial was thereafter had to the court on the issues tendered on the two affirmative defenses and the reply. The court made numerous findings of fact, and a single conclusion of law to the effect that the respondent corporation was rightfully in possession of the premises, and entered a judgment dismissing the appellant's complaint, with costs.

The first point urged by appellant is that the trial court erred in overruling his demurrer to each of the affirmative defenses. Assuming the allegations therein to be true, we are of the opinion that each of such defenses contain sufficient facts to show that the respondent Philadelphia Mortgage & Trust Company was in the rightful possession of the premises at the time of the commencement of this action, which is the pivotal question in the case at bar, and there-

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fore the court committed no error in its ruling in that behalf.

It is next contended that the court erred in denying appellant's request for a jury trial; that this right was guaranteed to him under the constitution of the state and the code of 1881, § 204. That section reads as follows:

"An issue of law shall be tried by the court, unless referred as provided in this chapter. An issue of fact shall be tried by a jury, unless a jury trial be waived, or a reference be ordered, as provided in this chapter. The waiver of a jury, or agreement to refer, shall be by stipulation of the parties filed, or the oral consent of parties given in open court and entered in the records: Provided, That nothing herein contained shall be so construed as to restrict the chancery powers of the judges, or to authorize the trial of any issue by a jury, when the complaint alleges an equitable claim, and seeks relief solely upon the ground of the equities of the demand by the pleadings in the action."

But under Section 83, subdivision 3, of that Code, it is provided that, "The defendant may set forth by answer as many defenses and counterclaims as he may have, whether they be such as have been heretofore denominated legal or equitable, or both . . . ;" plainly contemplating that an equitable defense may be set forth against a legal action, which was always to be tried without a jury. Under the issues tendered by the two affirmative defenses in the answer and reply, we are of the opinion that they presented matters of equitable cognizance to be tried first by the court without a jury. The appellant never having assumed the payment of the mortgage indebtedness, and not being a party to the contract between respondent company and the Geigers, the company, under the showing made, had no personal claim nor right to affirmative relief against appellant. The facts, as pleaded in the answer, fulfilled the office of a

negative resistance to appellant's right to recover the possession of the premises in question and damages for withholding the property. Pomeroy's Code Remedies, § 91 (3d ed.). The decisions cited by appellant from the federal courts do not apply. In cases originally brought before those tribunals, the distinctions made between legal actions and suits in equity are still recognized and applied to civil actions. But under the Code, equitable defenses are allowed in legal actions. They are to be first passed upon by the court. Until they shall have been disposed of, the assertion of the legal remedy is stayed. *Estrada v. Murphy*, 19 Cal. 273; *Lestrade v. Barth*, id. 671; *Crellin v. Ely*, 7 Sawy. 532, 13 Fed. 420.

Coming now to a consideration of the merits of the controversy, the principal contentions of appellant are that the trial court erred in its construction of the above agreement between the Geigers and respondent company, and in finding that the former surrendered possession of the premises to the company on September 1, 1894. From the testimony it appears that on November 1, 1892, at the city of Tacoma, Charles and Nettie Drury (husband and wife) executed to the Philadelphia Mortgage & Trust Company a promissory note for \$16,000, due five years after date, with interest at six per cent per annum till maturity, payable semi-annually, according to the tenor of ten coupon notes, each for \$480; No. 1 falling due May 1, 1893, and so on every six months thereafter in their order—No. 10 becoming due November 1, 1897; each of said notes bearing interest at the rate of two per cent per month after maturity.

To secure the payment of the principal and interest notes, the makers at that date executed a mortgage to respondent company on lot 6, the property described in the complaint. There were stipulations in the mortgage

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requiring the mortgagors to keep the buildings on said lot insured against loss by fire for the benefit of the mortgagee; to pay all taxes and assessments on such premises before delinquency; that in case of failure so to do the mortgagee might procure such insurance, pay said taxes and assessments, which should be added to the mortgage indebtedness with interest thereon at the rate of two per cent per month from date of payment; that the mortgagors, their successors, and assigns, should commit no waste, and keep the buildings, fences, and premises in good repair; that, in case of any default in any of the conditions of the mortgage, the mortgagee, at the expiration of five days after such default, might elect to declare the mortgage due, and recover according to the terms of the instrument. On the 12th day of November, 1892, this mortgage was recorded in the auditor's office of Pierce county.

It further appeared that, at the same time and place, the Drurys executed to respondent company their notes and mortgage on lot 7, adjoining lot 6, to secure a like principal sum, with coupon notes and same conditions as the mortgage on lot 6, which was recorded in the auditor's office on the same day as the former instrument. Through certain mesne transfers, Ida Geiger, on December 16, 1893, became the owner of the legal title to lots 6 and 7. On July 31, 1894, Ida Geiger and her husband, Joseph Geiger, being in possession of those lots, executed the agreement referred to in the above answer and copied in finding of fact No. 10 by the trial court, and delivered possession of the premises to the mortgagee. It further appears and the court found that the rents, issues, and profits accruing from possession of the premises had not, at the time of the commencement of this action, equaled the insurance, taxes, and arrears of interest mentioned in the contract.

The court also found, that in October, 1897, this prop-

erty was set over to said Ida Geiger by decree of the superior court of Pierce county in a divorce suit against her husband, Joseph Geiger; that in January, 1901, appellant succeeded to the interest of Ida Geiger; that the rental value of said premises was \$150.00 per month; that, at the date of the above agreement, the Geigers were notified by respondent company that papers had been prepared for the foreclosure of the mortgage on the premises described in the contract, which was made for the purpose of suspending such proceedings; that none of the conveyances, from the Drurys down to appellant, provide for the assumption of the mortgage on this property on the part of any of the grantees; and that the respondent company commenced an action in said court to foreclose the two mortgages on April 25, 1902.

The findings of fact and conclusions of law requested by appellant, and refused by the trial court, in the main present the questions as to the right to the possession of the property by the respondent company, and the meaning of the word "due," used in the contract, as applied to the coupon notes and interest thereon, referred to in the mortgage on lot 6. The testimony adduced at the hearing clearly warrants the conclusion that possession of the property in question was surrendered to the mortgage and trust company on September 1, 1894, and that the other respondents were its tenants at the time the action at bar was begun. Aside from the direct testimony, it is significant that the Geigers, for six years, permitted respondent company to lease the premises, collect the rents, make repairs, pay insurance and taxes, and disburse the moneys received for the rental of the property, without being called to account.

As to the meaning of the word "due" in the contract, we must construe the instrument in connection with the references made therein to the mortgages and premises. Then,

if any ambiguity should arise as to the meaning of the language used and the construction remains doubtful, the acts of the parties interested are entitled to great weight. The interest of each party generally leads him to an interpretation most favorable to himself. *Topliff v. Topliff*, 122 U. S. 121, 7 Sup. Ct. 1057, 30 L. Ed. 1110; Clark on Contracts, p. 594, and authorities cited in the foot-note. Applying the rules of law to the facts in the present controversy, we are of the opinion that this contract was prospective in its operation. It was dated July 31, 1894, was to take effect September 1 following, and possession of the premises was taken under the agreement at that date. The long acquiescence of the Geigers show that the minds of the parties to the contract met; that they expected a rest period to arrive when the rents collected would reimburse the respondent company for insurance, taxes, and other items of disbursements already paid, and for all interest upon the mortgage notes mentioned in the contract then in arrears, and not simply the interest due September 1, 1894, as contended for by appellant in his request for findings, and at the bar of this court. We therefore reach the conclusion that the rents received were insufficient to meet the above demands when this action was begun, and at the time of the trial, and that the court did not err in so finding.

The further contention is made that the superior court erred in not permitting appellant to file an amended complaint setting up the statute of limitations. After a careful examination of the record, we can find nothing upon which this contention can be predicated. Error will not be presumed. It must be made to appear affirmatively. The appellant cannot claim protection as an innocent purchaser without notice, when, at and before the time he succeeded to the interests of Ida Geiger, the respondent

company by its tenants was in the open, notorious, and actual possession of the premises for which recovery is sought in the present controversy. This was sufficient to put appellant upon inquiry. *Dennis v. Northern Pac. R. Co.*, 20 Wash. 329, 55 Pac. 210; Wade on the Law of Notice, §§ 273, 276, 286, 288; 23 Am. & Eng. Ency. Law, 498-501 (2d ed.)

No reversible error appearing in the record, the judgment of the superior court must be affirmed, and it is so ordered.

[No. 4829. Decided December 12, 1903.]

W. A. KELSO *et al.*, Respondents, v. RUSSELL & Co.,
Appellant, and J. P. LONG, Defendant.¹

PAYMENTS—APPLICATION—NOTES TO SECURE FUTURE ADVANCES—OPEN ACCOUNT. Where notes and mortgages were given in part to secure payment for future advances of merchandise from the mortgagee to the mortgagor, between whom there was an open book account before and after the notes were given, payments may be applied by the creditor to the open account, in the absence of directions by the mortgagor; and a subsequent mortgagee can not object to such application where it appears that the amount of the notes had been advanced, and no part paid, and that all credits had been given to the open account, which was not part of the notes.

MORTGAGES—PRIORITY. Where plaintiff held two notes for \$1000 each, one secured by mortgage upon real and personal property, and the other secured by a chattel mortgage upon entirely different property, and subsequently the debtor secures five notes to R by a mortgage upon real estate and also by chattel mortgages upon part of the personal property described in plaintiff's mortgages, R's real estate mortgage is subject to only one of plaintiff's notes, and a finding that it is subject to both of them is error.

¹Reported in 74 Pac. 561.

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SAME—FORECLOSURE—DECREE—PRIORITY—SEPARATE SALES. In a single action brought to foreclose both of plaintiff's mortgages in which R defends, the decree should provide for the separate sale of the real and personal property covered by the first of plaintiff's mortgages to satisfy the same, applying the balance of the proceeds upon R's mortgage; and the same as to the other of plaintiff's mortgages.

Appeal from a judgment of the superior court for Yakima county, Rudkin, J., entered April 7, 1903, upon the findings and decision of the court in favor of the plaintiff, decreeing the priority and foreclosure of plaintiff's mortgages. Reversed.

Crow & Williams, for appellant.

Whitson & Parker, for respondents.

MOUNT, J.—This was an action to foreclose three mortgages upon certain real estate and personal property. Three causes of action were set up separately in the complaint, one upon each mortgage. Defendant Long defaulted. Defendant Russell & Co., a corporation, appeared and contested the amount of plaintiffs' claim, and alleged a prior mortgage on the property described in the complaint. A decree was entered in favor of the plaintiffs. Defendant Russell & Co. appeals.

The facts appearing in the record are substantially as follows: On April 12, 1899, defendant J. P. Long made, executed, and delivered to plaintiffs, Kelso Bros., a mortgage upon the southeast quarter of sec. 10, tp. 8, N., R. 27 E., W. M., and also upon certain described personal property, to secure the payment of a note dated April 8, 1899, for \$1,000, with interest at ten per cent per annum. This mortgage provided for an attorney's fee of \$50 in case of foreclosure. On the 6th day of December, 1899, defendant Long made, executed, and delivered to plaintiffs, Kelso Bros., another promissory note for \$1,000, with interest at

ten per cent, and, to secure the payment of this note, executed and delivered a chattel mortgage upon certain described personal property. This property was different from the property described in the first mortgage above mentioned. This mortgage provided for \$20 attorney's fees in case of foreclosure.

On the 26th day of July, 1900, the defendant Long made, executed, and delivered to defendant Russell & Co. five promissory notes aggregating \$2,245, with interest at ten per cent, and, to secure the payment of these notes, executed and delivered a mortgage upon the real estate described in the first mortgage to Kelso Bros. This mortgage provided for \$200 attorney's fees in case of foreclosure. On the same date, to further secure the payment of the money described in the said five notes, defendant Long executed and delivered to Russell & Co. a chattel mortgage covering a part of the personal property described in each of the two mortgages given to Kelso Bros., above described. This chattel mortgage also contained other personal property.

Upon the trial of the case no proof was offered as to the execution of the third mortgage alleged in the complaint, which was a mortgage given by defendant Long to Kelso Bros., dated May 1, 1901, for \$2,237.50, being a part of the indebtedness described in the first two notes and mortgages above named, and other indebtedness. This amount of money was secured by a crop mortgage for the year 1901. At the conclusion of the trial the court made findings of fact, and entered the following decree:

"It is considered and decreed, that the plaintiff do have and recover of and from the defendant J. P. Long, the sum of \$2,581.82, with interest from the date hereof at the rate of ten per cent per annum, and the further sum of \$150 attorney's fees, together with the costs of this action to be taxed; that said amounts are a lien upon the

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property in the findings of fact described, by virtue of the two mortgages therein mentioned; that said mortgages be and the same are hereby foreclosed; that said property, except said crops of wheat, be sold by the sheriff of Yakima county, Washington, according to law and the practice of this court; and that the proceeds of said property be applied to the satisfaction of this judgment; and, if any deficiency remain after the application of the proceeds of said sale, that the plaintiff may have execution therefor; that the defendants and each of them be and are hereby barred and foreclosed of all equity of redemption in and to said premises and every part thereof, and in and to said personal property; that the plaintiff may become the purchaser at said sale; that the sheriff of Yakima county make a bill of sale of all of said personal property to the purchaser and deliver the same to him, and a certificate of sale for said real estate, and deliver the same to the purchaser thereof; and, after the time allowed by law for redemption has expired, in case no redemption is made, that the sheriff make, execute, and deliver a sheriff's deed therefor."

The findings of fact and conclusions of law, upon which the decree was based and to which appellant excepts on this appeal, are as follows:

"(10) That there is due from the said defendant Long upon said promissory notes the sum of \$2,581.82, with interest thereon from the date hereof until paid at the rate of ten per cent per annum, and the court finds that \$150 is a reasonable attorney's fee in this action. (11) That, by virtue of the mortgages aforesaid, the plaintiffs acquired a lien upon the property therein described, as security for the payment of said promissory notes. (12) That the note mentioned and described in the third cause of action in plaintiffs' amended complaint for \$2,237 covers the same indebtedness described in the two notes in these findings mentioned for \$1,000 each; that said note was taken by the plaintiffs in renewal of said two notes aforesaid, but the original notes were not surrendered, but were still retained by the plaintiffs as evidence of

said original indebtedness. (13) That the mortgage described in the answer of the defendant Russell & Co. is subsequent in time, and the lien thereof is inferior and subject to the lien of plaintiffs' mortgages. (14) That the crops of wheat described in said mortgages have already been sold and disposed of.

"Conclusions of Law.

"That the plaintiffs are entitled to recover of and from the defendant J. P. Long the sum of \$2,581.82, with interest thereon from the date hereof until paid at the rate of ten per cent per annum, and the further sum of \$150 attorney's fees, together with their costs in this action; and to a decree foreclosing said mortgages and each of them, and directing a sale of said property, except the said crops of wheat, and the application of the proceeds of the sale to the satisfaction of said amounts, and to a deficiency judgment for any amount remaining after the application of the proceeds of the sale of said property, and to an execution for such deficiency; and that the lien of the mortgage described in the answer of the defendant Russell & Co. is subsequent and subject and inferior to the lien of plaintiffs' said mortgages, and that plaintiffs are entitled in said decree to an order barring and foreclosing their equity of redemption therein."

It is first argued by appellant that the evidence shows the notes of April 12 and December 6, 1899, to have been paid. This contention is based upon the rule approved in *Frazer v. Miller*, 7 Wash. 521, 35 Pac. 427, to the effect that the debtor has a right to direct the application of payments made; if the debtor fails to direct where the payment shall be applied, then the creditor has a right to apply it as he desires; and if neither debtor or creditor applies it specially, then the law will apply or credit it to the oldest debt. It appears from the evidence, that each of these notes for \$1,000 was given by defendant Long in part to secure future advances of merchandise to him by Kelso Bros.; that in addition to the notes, there was an

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open book account between defendant Long and Kelso Bros., upon which payments had been made from time to time; and that these payments were credited by the plaintiffs upon the open book account. This book account between defendant Long and plaintiffs was running both before and subsequent to the execution of the notes of April 8 and December 6, 1899, and no payments were made by Long until after the execution of the notes, and then these payments were credited upon the open account at the times they were made. The rule contended for by the appellant, therefore, was complied with in this case, and the creditor gave credit to Long upon the account, as he had a right to do. We find no evidence in the record that the amount of the two notes described in the first two causes of action had not been advanced by the plaintiffs to Long, prior to the date of appellant's mortgage; viz., July 12, 1900. There is some evidence that no part of these notes had been paid, and that all the credits had been given to the open account, which was not a part of the notes. We conclude, therefore, that the rule contended for was followed, and that the lower court was right in finding the amount due the plaintiffs from Long to be \$2,581.82, upon both notes.

It is next contended that the appellant's mortgage in any event is subject only to plaintiffs' first mortgage dated April 12, 1899, for \$1,000, and interest at ten per cent and \$500 attorney's fee. This contention must be sustained. The evidence clearly shows, that the note of April 12, 1899, for \$1,000, was secured by mortgage upon the southeast quarter of sec. 10, tp. 8, N., R. 27 E., W. M., and also certain chattels; that the note of December 6, 1899, for \$1,000, was secured by mortgage upon entirely different property; that no part of the property described in one of the mortgages was security for the other note.

The mortgage of the appellant Russell & Co., for \$2,245, was a second lien upon the real estate described in plaintiffs' mortgage of April 12, 1899, and was subsequent in time only to that mortgage. There can be no question but plaintiffs are entitled to foreclose the mortgage of April 12, 1899, for \$1,000, and interest at ten per cent, and \$50 attorney's fees as provided in that mortgage, and also to have the amount thereof adjudged a lien upon the real estate and personal property therein described prior to the mortgage lien of Russell & Co. upon the same property. It is also true that the mortgage of December 6, 1899, is a lien upon the property therein described, which is all personal property, prior to the mortgage of Russell & Co. upon the same property. But no part of the amount due upon the note and mortgage of December 6, 1899, can be made a lien upon the property described in the mortgage of April 12, 1899, because none of the property described in the mortgage of April 12 is contained in the mortgage of December 6.

We are at a loss to understand upon what theory the lower court concluded that the mortgage of appellant Russell & Co. was subsequent in time, and the lien thereof inferior, to a lien for the whole amount of plaintiffs' claim upon both their mortgages. None is advanced by the respondents. Since appellant's mortgage upon the real estate was subsequent only to the plaintiffs' mortgage of April 12, 1899, the lower court should have made a decree of foreclosure and sale against the realty and personal property described in plaintiffs' first cause of action for the amount due upon the plaintiffs' first mortgage; viz., \$1,000, with interest from April 8, 1899, and \$50 attorney's fees, and thereupon directed the balance of the proceeds of such foreclosure sale to be applied to the discharge of appellant's mortgage. The same rule applies to the

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mortgage of December 6, 1899. This could be done only by making findings of fact or entering a decree showing the amount due upon each of plaintiffs' two mortgages.

The judgment appealed from is therefore reversed, and the cause remanded to the lower court to enter a decree in accordance with this opinion; appellant to recover his costs of this appeal.

FULLERTON, C. J., and HADLEY, ANDERS, and DUNBAR, JJ., concur.

[No. 4818. Decided December 15, 1903.]

LEE SMITH *et al.*, Respondents, v. CITY OF SEATTLE,
*Appellant.*¹

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—CONSTRUCTIVE NOTICE OF DEFECT—OTHER ACCIDENTS—PROOF OF ADMITTED FACTS. In an action against a city for personal injuries sustained by falling over an obstruction in the sidewalk, it is not reversible error for the plaintiff to show other instances of persons falling over the obstruction to prove constructive notice, although the city admitted notice by stipulation, since proof of admitted facts is not prejudicial error.

SAME. Such testimony was also admissible as descriptive of the place, and is not objectionable as being in the nature of a surprise to the city.

SAME—TRAP DOOR IN SIDEWALK—EVIDENCE AS TO OTHER DOORS. Where a trap door was maintained in the sidewalk projecting several inches above the level of the walk, evidence that no other trap doors in the city approximated the same height is not prejudicial to the city as such fact was to its credit and not to show other acts of negligence.

SAME—CONTRIBUTORY NEGLIGENCE. Such evidence was also admissible upon the issue of plaintiff's contributory negligence, if the city was negligent in maintaining the door in question.

SAME—EVIDENCE—SUFFICIENCY. Evidence that a trap door projected above the level of the sidewalk from two to four inches,

¹Reported in 74 Pac. 674.

and was worn very smooth and slippery, raises a question for the jury as to the city's negligence.

TRIAL—INSTRUCTIONS. An instruction in part correct is properly refused where the assumption made therein that the plaintiff was running at the time of the accident is not warranted by the evidence.

SAME. It is not error to refuse instructions covered by the general charge.

SAME—WITNESSES—CREDIBILITY—PHYSICIANS APPOINTED BY THE COURT. It is not error to refuse to instruct that the jury may take into consideration in determining the credibility and interest of witnesses that they were physicians appointed by the court to make a physical examination, and were not witnesses on behalf of either party, since that would say inferentially that the jury were at liberty to give greater credence to their testimony because they were selected by the court.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 30, 1903, upon the verdict of a jury rendered in favor of the plaintiff for \$7,633 damages for personal injuries sustained through a fall caused by a projecting trap door in the sidewalk. Affirmed.

Mitchell Gilliam and Hugh A. Tait, for appellant, contended, *inter alia*, that it was error to permit the plaintiff to prove accidents to other persons at the place in question. *Dean v. Murphy*, 169 Mass. 413, 48 N. E. 283; *Langhammer v. Manchester*, 99 Iowa 295, 68 N. W. 688; *Moore v. Richmond*, 85 Va. 538, 8 S. E. 387; *Phillips v. Town of Willow*, 70 Wis. 6, 34 N. W. 731, 5 Am. St. 114; *Bell v. Chicago etc. R. Co.*, 64 Iowa 321, 20 N. W. 456.

John B. Hart, for respondent.

HADLEY, J.—The respondents are husband and wife, and this action was brought to recover damages for alleged personal injuries sustained by respondent Christina D. Smith. It is alleged that, at the time the injuries were re-

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ceived and for many months prior thereto, the defendant, the city of Seattle, had negligently maintained, and permitted to exist in an unprotected and dangerous condition, certain trap doors upon the sidewalk, which doors opened into a cellar underneath the sidewalk on Second avenue in said city. It is also alleged, that the doors were made of iron, and were dangerously elevated above the surface of the adjoining sidewalk to a height of from two to three inches; that the doors met over the middle of the opening, and that at the point of meeting one door projected above the other; that these had become worn and smooth upon the surface, and at times were slippery and dangerous to travelers passing over the sidewalk in the ordinary and usual manner; that said respondent, in the night time, while passing over such sidewalk, being unaware of the conditions existing as aforesaid, and without fault upon her part, struck said projecting doors with her foot; that the doors were at the time slippery, and that said respondent stumbled, slipped, and fell, and was thereby violently thrown on to said doors and on to the sidewalk and ground, from which she received severe and permanent injuries.

The answer is a general denial, and also contains an affirmative plea of contributory negligence. The cause was tried before a jury, and a verdict was returned against the defendant city in the sum of \$7,633. The defendant's motion for new trial was denied, and judgment was entered for the amount of the verdict. The city has appealed.

It is assigned that the court erred in permitting respondents to prove, over appellant's objection, instances of other persons at other times slipping upon, or falling over, the doors upon which it is alleged the respondent Mrs. Smith stumbled and fell. It is insisted by appellant that the most that may be urged in favor of this testimony is that it was competent for the purpose of showing con-

structive notice to the city of the alleged defect of the doors in question, and that the necessity for proof of such notice was obviated by the stipulation of counsel for appellant made at the beginning of the trial. By that stipulation, appellant admitted notice of the conditions existing, and it is therefore contended that the criticised testimony could have served no other purpose than to impress the jury, by facts outside of any question they were called upon to determine, that the city was permitting to be maintained on its sidewalk an obstacle of a highly dangerous character to pedestrians. It is further urged that the testimony was prejudicial because it distracted the attention of the jury from the facts in issue to collateral matters of which no notice was given appellant by the pleadings, and that no opportunity was afforded to disprove them. It is argued by appellant that it could not have been expected to investigate and ascertain the truth as to circumstances surrounding the several instances of other accidents proved, when advised thereof for the first time in the midst of the trial, and that in the absence of any contradictory evidence such instances necessarily stood admitted.

That the testimony was relevant to the question of notice is practically conceded by appellant, and, in any event, we think it was so under many authorities. It is true that, while notice was in issue under the pleadings, it was admitted at the trial; but in *Fitzgerald v. School Dist.*, 5 Wash. 112, 31 Pac. 427, it was held that, while it is unnecessary to make proof of admitted facts, yet the error in admitting such testimony is immaterial and not prejudicial. To the same effect is *Jones v. Allen*, 85 Fed. 523, in which the court, at page 525, said:

"It may be that it was unnecessary to have read the records in evidence because the facts which they tended to prove were in effect admitted by the pleadings. But

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if the plaintiffs saw fit to establish the allegations of their complaint with greater certainty by introducing the records, the defendants cannot be heard to complain. They were not prejudiced by the proof of facts which they had admitted."

See also: *People v. Fredericks*, 106 Cal. 554, 39 Pac. 944; *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Trogdon v. State*, 133 Ind. 1, 32 N. E. 725.

While this class of evidence, as pertinent to the subject of notice, may not have been necessary under the admission of appellant, yet we think it was admissible upon another theory; viz., that it tended to be descriptive of the condition of the sidewalk. It was so strongly intimated, if not actually held, in *Elster v. Seattle*, 18 Wash. 304, 51 Pac. 394. The same rule was declared in *District of Columbia v. Armes*, 107 U. S. 519, 2 Sup. Ct. 840, 27 L. Ed. 618. In that case, when referring to the evidence of other accidents at the same place as the one in question, Mr. Justice FIELD said, at pages 524, 525:

"They were proved simply as circumstances which, with other evidence, tended to show the dangerous character of the sidewalk in its unguarded condition. The frequency of accidents at a particular place would seem to be good evidence of its dangerous character—at least, it is some evidence to that effect. Persons are not wont to seek such places, and do not willingly fall into them. Here the character of the place was one of the subjects of inquiry to which attention was called by the nature of the action and pleadings, and the defendant should have been prepared to show its real character in the face of any proof bearing on that subject."

See also *City of Topeka v. Sherwood*, 39 Kan. 690, 18 Pac. 933; *Lombar v. Village etc.*, 86 Mich. 14, 48 N. W. 947.

While the authorities are not uniform as to the admissibility of this class of evidence for the purpose last stated,

yet it is held by eminent authority to be so admissible, and, as we have seen, this court has already in effect recognized such rule. Answering appellant's argument that such testimony was in the nature of a surprise, and that it was unprepared to meet it, the same point was considered in the language of Mr. Justice FIELD quoted above, and referred to in other cases cited. It was held that the character of the places of the accidents was one of the subjects of inquiry, and that the defendant should have been prepared to show the real character in the face of any proof bearing upon the subject. We think it was not error to admit the testimony.

One witness testified over objection that he had looked the city over and had not been able to find another door projecting above the sidewalk approximating the height of the ones in question. It is urged, that the admission of this testimony was error; that there was no issue as to the character of other doors in the sidewalks; that appellant had no notice that such testimony would be offered, and was therefore unprepared to meet it. It was, however, alleged in the complaint, and denied by the answer, that all other similar openings in the sidewalks of the city were protected by coverings which did not project above the level of the adjoining sidewalk. As far as the pleadings were concerned, appellant had, therefore, joined issue upon that subject, had not moved to eliminate it from the complaint as immaterial, and did have notice that respondent might seek to show it by evidence. But whether the testimony became material by reason of the pleadings or not, we do not think it was prejudicial to appellant. It was not sought to show that the city was negligent in this instance by reason of negligence in other instances, but rather that, at all other places where trap doors were permitted in the sidewalks, due care had been

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exercised. Such testimony was to the credit, and not to the prejudice, of the city.

We also think that the testimony was pertinent as bearing upon the question of contributory negligence, which was made an issue by the pleadings. One accustomed to using the sidewalks of the city and finding them uniformly free from obstructions of the kind alleged in this case, would naturally, without knowledge of the particular defect, presume that all the sidewalks were in like safe condition. While such a presumption is ordinarily indulged in any event, as arising out of the duty of the municipality to keep the sidewalks reasonably safe for travel, yet in this instance the testimony tends to show that the injured respondent was not, by reason of ordinary conditions existing on the sidewalks of the city, under any special duty to be on the lookout for such an obstruction. To such effect is the rule applied in *Lamb v. Worcester*, 177 Mass. 82, 58 N. E. 474; *Grace & Hyde Co. v. Kennedy*, 99 Fed. 679. The testimony was, therefore, not incompetent if it reasonably appeared that the city was negligent in permitting the maintenance of the doors in question, which the witnesses' testimony tended to show was the only place of like character in the city.

Whether the doors and surroundings were of such character as made them unsafe to pedestrians, and thus established negligence, was, of course, for the jury, if the evidence thereof reasonably justified its submission to the jury. Pertinent to that subject we may say that the evidence of respondents' witnesses as to the height of the doors and hinges above the sidewalk, while varying somewhat, was to the effect that such elevation was from two to four inches. One witness testified that he saw it measured with a spirit level, and that the doors proper were one and one-half inches, and the hinges about two and one-

quarter inches, above the sidewalk, respectively. Others estimated the elevation at right angles above the sidewalk level at even more, as stated above. Appellant's only witness upon this subject estimated the height of the several hinges from one and five-eighths inches to one and seven-eighths inches above the sidewalk. This witness, a civil engineer, admitted that the only accurate way to make the measurements was by means of a spirit level, which he did not use. There was also evidence to the effect that the doors were worn very smooth, and were, for that reason, slippery. That the evidence as to the height of the doors and hinges was such as raised the question for the jury whether the maintenance on the sidewalk of a contrivance such as described established negligence of the city, is supported by the following similar cases: *Lamb v. Worcester*, *supra*; *Redford v. Woburn*, 176 Mass. 520, 57 N. E. 1008; *Fordham v. Gouverneur Village*, 160 N. Y. 541, 55 N. E. 290; *Baxter v. Cedar Rapids*, 103 Iowa 599, 72 N. W. 790; *City of Lawrence v. Littell*, 9 Kan. App. 130, 58 Pac. 495.

That the evidence as to the slippery surface of the metallic doors was also properly for the jury is sustained by the following: 15 Am. & Eng. Enc. Law, 458, 459 (2d ed.); *Cromarty v. Boston*, 127 Mass. 329, 34 Am. Rep. 381; *Lyon v. Logansport*, 9 Ind. App. 21, 35 N. E. 128; *Leonard v. Butte*, 25 Mont. 410, 65 Pac. 425.

Thus, there was sufficient evidence bearing upon the question of negligence of the city to make the testimony criticised under this assignment of error competent. There being evidence tending to establish negligence at the particular place, testimony tending to show that no other such defect existed in the same, or any other sidewalk of the city, became competent for reasons hereinbefore stated. The court did not err in admitting it.

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It is assigned that the court erred in refusing to give a certain requested instruction upon contributory negligence. The instruction requested left the jury to find, among other things, that the plaintiff was running at the time she was injured. We do not think the evidence justified that part of the instruction. The injured respondent testified that she was walking along "just in an ordinary walk" at the time. Taking the instruction as a whole, it was therefore properly refused. An instruction which is in part correct but in other particulars incorrect should be refused as a whole. *Duggan v. Pacific Boom Co.*, 6 Wash. 593, 34 Pac. 157, 36 Am. St. 182; *Croft v. Northwestern Steamship Co.*, 20 Wash. 175, 55 Pac. 42. An instruction which refers to matters not in evidence is properly refused. *Woo Dan v. Seattle Elec. etc. Co.*, 5 Wash. 466, 32 Pac. 103; *Einseidler v. Whitman County*, 22 Wash. 388, 60 Pac. 1122. Other proper points embodied in the requested instruction we believe were amply covered by instructions given, and we have often held that when such is the case it is not error to refuse to give an instruction in the language requested.

It is urged that the court erred in refusing to give the following requested instruction:

"You are instructed that Dr. James Shannon and Dr. C. W. Sharpless are physicians who were appointed by this court as a commission to examine the plaintiff Christina D. Smith with reference to the extent and nature of her injuries. They are witnesses neither in behalf of the plaintiffs or the defendant, and this fact you may take into consideration in determining their credibility, interest, or lack of interest, in the result of this suit, and the weight to be attached to their testimony."

We think the instruction was properly refused. While it is true that the physicians named had been appointed by the court to examine the injured respondent, yet they

testified as witnesses called by appellant. To have given the instruction would have been for the court to say, inferentially at least, that the jury were at liberty to give greater credence to the testimony of these witnesses because they had been selected by the court. This would have been clearly erroneous. Their testimony must be subjected to the same tests as that of other witnesses, and it would have been error for the court to distinguish it as being subject to any different rule.

It is unnecessary to discuss the assignment that error was committed in overruling the motion for a new trial. No claim is made in this court that the verdict is excessive, and other questions involved in the motion for a new trial, which have been urged here, have already been sufficiently discussed.

The judgment is affirmed.

FULLERTON, C. J., and ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4803. Decided December 16, 1903.]

HEALY LUMBER COMPANY, *Appellant*, v. SHAMGAR MORRIS *et al.*, *Respondents*.¹

EMINENT DOMAIN—PUBLIC USE—RIGHT OF WAY FOR LOGGING ROADS—TAKING PROPERTY FOR PRIVATE USE. Laws of 1899, p. 255, granting to the owner of timbered lands the right to condemn a right of way for logging roads and lumbering purposes contravenes Const., art. 1, § 16, prohibiting the taking of private property for private use.

SAME—PUBLIC USE A JUDICIAL QUESTION—DISCRETION. Const. art. 1, § 16, providing that the question in condemnation proceedings whether a use is a public use shall be a judicial question, negatives the idea that any weight should be given by the courts to the fact that the legislature has pronounced a certain thing a

¹Reported in 74 Pac. 681.

38	490
38	548
38	490
35	665
35	666

33	490
33	663
33	666
33	668
33	490
42	666

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Citations of Counsel.

public use, and submits the question of public use to the discretion of the courts.

SAME—STATUTES—PRESUMPTION. Nor does the ordinary presumption in favor of the constitutionality of an act apply to a legislative assertion upon a subject that has been specially submitted to the courts.

SAME—DISTINCTION BETWEEN LOGGING AND BOOM COMPANIES. A private logging company in the exclusive prosecution of its own private business stands upon a footing in relation to the power of eminent domain different from that occupied by a boom company doing a carrying business for the public.

SAME—PUBLIC BENEFIT NOT PUBLIC USE. The public use authorizing the exercise of the right of eminent domain contemplated by the constitution is not synonymous with public benefit, and a use for private enterprises does not authorize the exercise of the right however much public policy demands it, or whatever the public benefit therefrom may be, but it must be a use by the public or by some agency that is quasi public.

SAME—CONDEMNATION OF PRIVATE WAYS OF NECESSITY—GRANT. A condemnation proceeding by the owner of timbered lands for the purpose of acquiring a right of way for a logging road and lumbering purposes, under Laws of 1899, p. 255, cannot be sustained under the provision of the constitution, art. 1, § 16, permitting the taking of private property for private ways of necessity, as such ways have reference to the common law definition of the term, requiring the element of grant, and having no reference to the land of strangers.

Appeal from a judgment of the superior court for King county, Albertson, J., entered April 9, 1903, upon sustaining a demurrer to the complaint, dismissing an action brought to condemn a right of way for a logging road and waterway. Affirmed.

Preston, Carr & Gilman and *Hoyt & Haight*, for appellants. The violation of the constitution must be clear; where the public use is declared by the legislature it will be so held unless it manifestly appears otherwise. *Hazen v. Essex County*, 12 Cush. 475; *Talbot v. Hudson*, 16 Gray 417. Eminent domain is the power to apply private

property to a public purpose on payment of just compensation. *Charles River Bridge Co. v. Warren Bridge*, 11 Pet. 420; *Mississippi etc. Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *United States v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346. In all governments it is the highest idea of property. Grotius, *De Jure Belli et Pacis*, Lib. 3 c. 20, VII, 1; *Beekman v. Saratoga etc. R. Co.*, 3 Paige 45, 22 Am. Dec. 679. It embraces all cases of taking, by the state or private parties, for public purposes, or where the public welfare is promoted indirectly by increased prosperity. Lewis, *Eminent Domain*, § 1 (2d ed.). Public use means public benefit, interest, or convenience. *Pierce, Railroads*, 143; *Olmstead v. Camp*, 33 Conn. 533, 89 Am. Dec. 221; *Aldridge v. Tuscumbia etc. R. Co.*, 2 Stew. & Por. 199. Necessity is said not to be a test of usefulness. Lewis, *Eminent Domain*, § 162; *Dayton etc. Min. Co. v. Seawell*, 11 Nev. 394. Yet necessity is at the basis of the exercise of eminent domain, and the ultimate consideration in determining whether the use is public. *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56; *Cooley*, Const. Lim. 651-659 (6th ed.); *People v. Township Board*, 20 Mich. 452; *Fiske v. Framingham Mfg. Co.*, 12 Pick. 67. The courts sustain the power for the private benefit of one or more persons. *Lewis v. Washington*, 5 Gratt. (Va.) 265; *Roberts v. Williams*, 15 Ark. 43; *Paine v. Leicester*, 22 Vt. 44; *Drake v. Clay*, Sneed (Ky.) 139; *Johnson v. Clayton County*, 61 Iowa 89, 15 N. W. 856; *Pagels v. Oaks*, 64 Iowa 198, 19 N. W. 905. Condemnation has been sustained for the purposes of a cemetery. *Evergreen Cemetry Ass'n v. Beecher*, 53 Conn. 551, 5 Atl. 353. For dikes and levees. *Egyptian Levee Co. v. Hardin*, 27 Miss. 495; *New Orleans Drainage Co.*, 11 La. An. 338; *Cypress Pond Draining Co. v. Hooper*, 2 Met. (Ky.) 350; *Tide Water*

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Citations of Counsel.

Co. v. Coster, 18 N. J. Eq. 518, 90 Am. Dec. 634; *Matter of drainage etc.*, 41 N. J. L. 175; *Northfleet v. Cromwell*, 70 N. C. 634, 16 Am. Rep. 787; *Hansen v. Hammer*, 15 Wash. 315, 46 Pac. 332. To reclaim marsh lands. *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779. For irrigation purposes. *Prescott Irrigation Co. v. Flathers*, 20 Wash. 454, 55 Pac. 635. For private passage ways. *Jones' Heirs v. Barclay*, 2 J. J. Marsh. 73; *MacCauley v. Dunlap*, 4 B. Mon. 57, 16 Am. Dec. 130; *Rout v. Mountjoy*, 3 B. Mon. 300; *Troutman v. Barnes*, 4 Met. (Ky.) 337; *Robinson v. Swope*, 12 Bush. 21. In aid of the utilization of water power, in every state where such power is a great natural resource. *Boston etc. Co. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622; *Scudder v. Trenton etc. Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Olmstead v. Camp*, 33 Conn. 532; *Todd v. Austin*, 34 Conn. 78; *Occum Co. v. Sprague Mfg. Co.*, 35 Conn. 496; *Hankins v. Lawrence*, 8 Blackf. 266; *Great Falls Mfg. Co. v. Fernald*, 47 N. H. 444; *Amoskeag Mfg. Co. v. Head*, 56 N. H. 386; *Ash v. Cummings*, 50 N. H. 591; *Amoskeag Mfg. Co. v. Goodale*, 62 N. H. 66; *Burnham v. Thompson*, 35 Iowa 421; *Venard v. Cross*, 8 Kan. 248; *Miller v. Troost*, 14 Minn. 365; *Traver v. Merrick Co.*, 14 Neb. 327, 15 N. W. 690, 45 Am. Rep. 111; *Newcomb v. Smith*, 2 Pin. (Wis.) 131. It is sustained for a flume to convey water to lumber mills. *Maffet v. Quine*, 93 Fed. 347; *Dalles Lumbering Co. v. Urquhart*, 16 Ore. 67, 19 Pac. 78. For a dam to flood lands for the private cultivation of fish. *Turner v. Nye*, 154 Mass. 519, 28 N. E. 1048. For dams in aid of the cultivation of cranberries. *Bearse v. Perry*, 117 Mass. 211; *Turner v. Nye*, 154 Mass. 579, 28 N. E. 1048. In aid of the development of mines. *Dayton Min. Co. v. Seawell*, 11 Nev. 394; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Downing v.*

More, 12 Colo. 316, 20 Pac. 766; *Lamborn v. Bell*, 18 Colo. 346, 32 Pac. 989. For drainage purposes. *Seely v. Sebastian*, 4 Ore. 25. For a highway, although only one person or family is accommodated. *Lewis v. Richmond*, 5 Gratt. (Va.) 265; *Paine v. Leicester*, 22 Vt. 44; *Pagels v. Oaks*, 64 Iowa 199, 19 N. W. 905. The public is interested in having products marketed. *Los Angeles County v. Reyes* (Cal.), 32 Pac. 233. Cases refusing condemnation for manufacturing sites are distinguished on the ground that sites can be secured without the necessity of condemnation. *Oury v. Goodwin* (Ariz.), 26 Pac. 376. Government must adapt itself to the existing condition and wants of society. *Swan v. Williams*, 2 Mich. 438. The promotion of particular industries is held controlling and sufficient. *Paxton & Hershey Irr. etc. Co. v. Farmers etc. Co.*, 45 Neb. 884, 64 N. W. 343, 50 Am. St. 585; *Dayton etc. Min. Co. v. Seawell*, 11 Nev. 394; *Hand Gold Min. Co. v. Parker*, *supra*; *Butte etc. R. Co. v. Montana Union R. Co.*, 16 Mont. 550, 41 Pac. 248; *Chicago etc. R. Co. v. Morehouse*, 112 Wis. 1, 87 N. W. 849, 88 Am. St. 918; 7 Lawson's Rights, Rem. & Prac., § 3885; *North River Boom Co. v. Smith*, 15 Wash. 138, 45 Pac. 750. Recent cases supporting appellant's cause are: *Leigh v. Garysburg Mfg. Co.*, 132 N. C. 167, 43 S. E. 632 (logging road); *State, Albright v. Sussex County etc.* (N. J.), 53 Atl. 612; *Missouri etc. R. Co. v. Cambern*, 10 Kan. App. 581, 63 Pac. 605 (levees); *Morrison v. Thistle Coal Co.* (Iowa), 94 N. W. 507 (for spur track to a quarry); *Madera County v. Raymond Granite Co.*, 138 Cal. 244, 71 Pac. 112 (for a private road).

Walter S. Fulton and *Vinc: H. Faben*, for respondent. By the weight of authority public use is defined as meaning use by the public. *Lewis, Eminent Domain*, § 165;

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Bloodgood v. Mohawk etc. R. Co., 18 Wend. 9, 31 Am. Dec. 313; *Welton v. Dixon*, 38 Neb. 767, 57 N. W. 559, 22 L. R. A. 496, 41 Am. St. 771; *Bankhead v. Brown*, 25 Iowa, 540; *Jenal v. Green Island Draining Co.*, 12 Neb. 163, 10 N. W. 547; *Apex Transportation Co. v. Garbade*, 32 Ore. 582, 52 Pac. 573, 54 Pac. 367, 882 (a case directly in point); *Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *People v. Pittsburg R. Co.*, 53 Cal. 694; *State v. Railway Co.*, 40 Ohio St. 504; *Consolidated Channel Co. v. Central Pac. R. Co.*, 51 Cal. 269; *Edgwood R. Co.'s Appeal*, 79 Pa. St. 257; *Salt Company v. Brown*, 7 W. Va. 191; *Sholl v. German Coal Co.*, 118 Ill. 427, 10 N. E. 199; *Tyler v. Beacher*, 44 Vt. 648; *Loughbridge v. Harris*, 42 Ga. 501; *Ryerson v. Brown*, 35 Mich. 333, 24 Am. Rep. 564; *Hay v. Cohoes Co.*, 3 Barb. 42; *Varner v. Martin*, 21 W. Va. 534; *McQuillen v. Hatton*, 42 Ohio St. 202; *Garbutt Lumber Co. v. Georgia etc. R. Co.*, 111 Ga. 714, 36 S. E. 942; *Taylor v. Porter*, 4 Hill 140; *Patterson v. Baumer*, 43 Iowa 477; *Reeves v. Treasurer*, 8 Ohio St. 333; *In re Niagara etc. R. Co.*, 108 N. Y. 375, 15 N. E. 429; *Brewster v. Rogers Co.*, 169 N. Y. 73, 62 N. E. 164; *In re Theresa Drainage Dist.*, 90 Wis. 301, 63 N. W. 288; *Logan v. Stogdale*, 123 Ind. 372, 24 N. E. 135; *Pittsburg etc. R. Co., v. Benwood Iron Works*, 31 W. Va. 710, 8 S. E. 453; *McCandless' Appeal*, 70 Pa. St. 210. The constitutional provision with reference to private ways of necessity is not self executing. *Long v. Billings*, 7 Wash. 267, 34 Pac. 936. The logging roads authorized by the law of 1899 are not private ways of necessity as defined by Laws 1895, p. 181; nor as defined by the common law. *Barr v. Flynn*, 20 Mo. App. 383; *Stewart v. Hartman*, 46 Ind. 331; *Burwell v. Sneed*, 104 N. C. 118, 10 S. E. 152; *Seeley v. Bishop*, 19 Conn. 128; *Gayetty v. Bethune*, 14 Mass. 49.

DUNBAR, J.—This is an action brought by appellant to condemn land and waters for a logging road and waterway in King county. A demurrer to the complaint was sustained, and, the plaintiff electing to stand on its complaint, judgment was rendered for the defendants. The complaint made the necessary allegations to bring the case within the statute which provides for the condemnation of logging roads and waterways. The act is found on page 255 of the Laws of 1899, and the first section thereof is as follows:

“§ 1. Any owner or owners of any timbered lands, or timber, desiring to cut or remove the same to a point wherein the same may be manufactured, transported, by either rail or water, driven, rafted, assorted, boomed or shipped for lumbering purposes, and having no practical route for a road or right-of-way whereon to remove or haul said timber, shall have the right to condemn as hereinafter provided, a right-of-way for a logging road, or chute, stream, or water-course from said lands to any waters, railroad, logging road or chute or public highway, by the most direct and feasible route, and shall have the right to condemn the use of any stream, water-course, slough, pond or lake together with sufficient land along the bank or banks thereof, to enable the driving, rafting, booming, or handling of such timber for the removal of said timber provided that proceedings to obtain such right-of-way shall conform to the law allowing private corporations to condemn a right-of-way in this state, except as is hereinafter provided.”

Sections 2, 3, 4 and 5 provide the mode of procedure. Sections 7 and 9 are as follows:

“§ 7. Judgment shall be entered upon said verdict or finding appropriating an easement upon said land and other property for said right-of-way for the purpose only of logging or removing timber from the land set forth in said complaint: *Provided, however,* That any one or more persons owning or controlling timber land or timber and

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entitled to condemn such right-of-way under the provisions of this act may join as plaintiffs in such action. Any person condemning such right-of-way shall have the exclusive use thereof and the right to remove therefrom any improvements or structures placed thereon, subject to the right of any other person or persons to condemn said logging road, chute, stream, water-course or slough, as herein provided: *Provided further*, That any other party owning or controlling timber tributary to any such stream or water-course condemned as aforesaid, and who has not joined in such condemnation, may have the right to use the same upon paying to the parties owning the right-of-way the proper proportion of the cost of such improvement and the expenses of maintaining the same, to be determined by the superior court of the proper county, if the parties cannot agree.

“§ 9. When any logging road or chute, stream or water-course, slough, or lake shall cease to have been used for one year, any party interested may file a motion in such action and upon notice to the owner or person in charge of such timber, obtain an order vacating such right-of-way, unless good cause is shown why such logging road or chute, stream, water-course, slough, pond, or lake upon such condemned right-of-way should not be vacated. Nothing but an easement can be acquired by this proceeding and no interest in the land shall pass by the decree of appropriation.”

The demurrer was sustained on the ground that the act was in contravention of § 16, art. 1 of the constitution of this state, which provides as follows:

“Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes or ditches on or across the lands of others for agricultural, domestic or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made or paid into court for the owner, and no right-of-way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascer-

tained and paid into the court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in courts of record, in the manner prescribed by law. Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public;"

in that the act of condemnation did not provide for a public use of the land condemned.

This case presents important questions, deserving the most serious consideration, involving as it does the representative interests of private rights, and of property of the state sought to be protected and fostered through the exercise of the high prerogative of sovereignty; the former being guaranteed by the fundamental law, and the latter being a subject of universal interest and concern. Eminent domain is the right or power of a sovereign state to appropriate private property. This right is generally exercised through condemnation proceedings, and the rights of the individual must yield to the superior rights of the state as a promoter and conservator of the public welfare. It will be seen that the vital question to be determined is whether the statutory proceedings in question secure the public or private use of the property condemned.

An immense number of authorities have been cited in this case, all of which we have carefully examined, but a particular analysis of which cannot be made within the limits of a reasonable opinion. But, from the research we have made, we conclude that both the weight of authority and the better reasoning sustain the judgment in this case: that, therefore, the statute in question is in contravention

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of the constitution, and that the words "public use" were not used by the framers of the constitution in the liberal and, it seems to us, somewhat indiscriminate sense which is contended for by the appellant.

The learned attorneys for appellant have favored the court with an exhaustive and earnest argument in their brief, and a painstaking showing is made of the magnitude of the lumbering business and interest of this state, and the effect that it presumably has upon the general prosperity of the commonwealth, and we are urged to announce a broad and statesmanlike principle in determining this question, and one which would further the business prosperity of the state rather than one which would hamper and retard it. But the court cannot invade the province of the law-making powers of government, and intrude into its decrees its opinion on questions of public policy. Its duty is to strictly recognize its legal limitations and confine itself to the narrower duties of interpretation and construction. The main arguments in the brief, powerful as they are, would have been more appropriately presented to the framers of the constitution.

Many of the cases cited by the appellant have no application to this case, for the reason that they are from states having constitutions with different provisions from ours on the subject of eminent domain. An examination of all the different constitutions in the Union shows that only two other states, viz., Colorado and Missouri, have the provision of our constitution that "whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question and determined as such, without regard to any legislative assertion that the use is public." That fact eliminates from the discussion in this case all that line of cases which hold that the fact that the legis-

lature has either pronounced a certain thing a public use, or has so indicated by its enactment, by conferring the right of eminent domain, ought to have great weight with the court in construing the constitutionality of the act; because our constitution has expressly negatived any such idea, evidently deeming it necessary to place a restriction upon legislative sentiment in this respect. So that, under the provision of our constitution, the court is untrammelled by any consideration due to legislative assertion or enactment.

Most of the constitutions have limitations upon the power of the state to condemn private property except for public use. A good many, however, have left in the state just such powers as it had, untrammelled by limitations, and cases from states where there is no limitation on legislative enactment, of course, are without value in the consideration of this case. The first few cases cited by appellant, commencing with the citation from Grotius, simply announce the undisputed doctrine that the power of eminent domain is inherent in sovereignty, and that the property of the subject is under the power of the eminent domain of the state to such an extent that the state may use and even destroy such property for ends of public utility. *Hazen v. Essex Company*, 12 Cush. 475, is not in point, for the announcement of the court in that case was that in determining the question we must look to the declared purpose of the act, and, if a public use was declared, it would be so held, unless it manifestly appeared by the provisions of the act that they could have no tendency to advance and promote such public use. So that with a premise of this kind it can readily be seen that any conclusion reached by the court would not be valuable in determining rights under a constitution like ours. *Talbot v. Hudson*, 16 Gray 417, was a case from the same state, and, while in some respects its reasoning coincides with the appellant's contention in rela-

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tion to the property of the people benefited, it makes the following announcement:

"When an act has been passed with all the requisites necessary to give it the force of a binding statute, it must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution. It is therefore incumbent on those who deny the validity of a statute, to show that it is a plain and palpable violation of constitutional right."

And this statement, which we concede is ordinarily a proper statement of the law, is, we think, not applicable under the provisions of our statute, where the sole question at issue, viz., whether or not the contemplated use be really public, is taken by special enactment from the legislature and placed within the discretion of the court. Under such circumstances the case comes to the court without any presumption one way or the other on the subject of public use, but is to be tried by the court like any other question that is submitted to its discretion. In support of his view the appellant presents the following quotation from Lewis on Eminent Domain, § 1:

"It embraces all cases where, by authority of the state and for the public good, the property of the individual is taken, without his consent, for the purpose of being devoted to some particular use, either by the state itself or by a corporation, public or private, or by a private citizen. Apart from constitutional considerations, it is not essential, in order to constitute an act of eminent domain, that the use for which the property is taken should be of a public nature. It is sufficient that the use of the property for the purpose proposed is necessary to enable individual proprietors to cultivate and improve their land to the best advantage, or to develop certain natural and exceptional resources incident thereto, such as a water privilege or a mine. In such cases the public welfare is promoted, though indirectly, by the increased prosperity which necessarily results from developing the natural resources of the country."

It is the unlimited use of the power of eminent domain of which Mr. Lewis was speaking, but what he says in no way aids the determination of this question, for the author, continuing in the same section, says:

"Doubtless the definitions which restrict eminent domain to a taking for public use have been inspired by the constitutional provisions which prevail in the United States and impose this limitation on the exercise of the power;"

the limitation being that the taking should be for a public use. And there is nothing in the language of the author by which we can conclude that the cases which he cites would be considered a taking for public use.

It is insisted that the courts have sustained the taking of property, ostensibly for the use and enjoyment of the property by the public, but really for the private benefit of one or more persons, and *Lewis v. Washington*, 5 Gratt. 265, is cited. This case does not involve the constitutional limitation, or any question of the power of eminent domain, but is a construction of the power of the county court under the law to establish a road, and it was held that its establishment rested within the discretion of the court. In the discussion of that case the court laid down the broad doctrine that there was no principle upon which the wants and necessities of one individual must be imperatively rejected, which would not be applicable to two or three or a dozen, or any given number short of the whole or the greater part of the community, a doctrine which, of course, could not be sustained if it were applied to the subject of eminent domain under our constitutional provisions. The other cases cited under this head do not seem to us to be important as sustaining either view of this controversy. It is true that condemnation of lands for a cemetery has been sustained, and for dikes and levees for draining swamps,

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and for many purposes of like character, but in all such cases there was more of an element of public use than in the case at bar, and the decisions were based on reasons that could not be applied to this case.

The case of *North River Boom Co. v. Smith*, 15 Wash. 438, 45 Pac. 750, is somewhat relied upon by appellant, from the statement therein made that boom companies were quasi public corporations. The writer of this opinion, being the writer of that, feels free to say that the opinion indulged in statements outside of the issues presented. The constitutional provision in question was not under consideration, the question being on the construction of § 28, art. 2, of the constitution, in relation to special legislation, and no authorities were cited even on that question. But a boom company, organized under the laws of the state to do a carrying business for the public, stands on a different footing from a private logging company in the exclusive prosecution of its own private business. One is, to a certain extent, a common carrier compelled to serve the public, while upon the other, no such duties are imposed. It is true the statute provides:

"That any other party owning or controlling timber tributary to any such stream or water-course condemned as aforesaid, and who has not joined in such condemnation, may have the right to use the same upon paying to the parties owning the right-of-way the proper proportion of the cost of such improvement and the expenses of maintaining the same, to be determined by the superior court of the proper county, if the parties cannot agree;"

but this in effect only increases the number of parties in the company and falls far short of imposing a public duty. And, in any event, we do not care to extend the doctrine which we have already announced.

It must be conceded, however, that there are quite a

number of decisions to the effect that the phrase "public use" should be construed to be synonymous with public benefit, and that, when it is determined that the use is of great benefit to the public at large, condemnation of private interests should be guaranteed, even though the use is not by the state or through any of its agencies. One of the most prominent and direct decisions thus holding is *Dayton Gold etc. Min. Co. v. Seawell*, 11 Nev. 394. There the broad doctrine was announced that any appropriation of private property under the right of eminent domain, for any purpose of great public benefit, interest, or advantage to the community, is a taking for public use; the application in that case being to condemn a strip of land in order to transport the wood, lumber, timbers, and other materials to enable it to conduct and carry on its business of mining. The law granting the privilege was sustained on the ground that mining was one of the leading industries of the state, and the principles above announced were applied. This is, in substance, the contention of the appellant in this case.

It seems to us, however, that this is the announcement of a dangerous doctrine, tending to encroach upon private rights which the constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. Under such a rule an act might be construed to be legal one year, because a certain business was found to be profitable to the community at large, and the next year held void because it appeared that the business was not a paying one. The constitution is the fundamental law. Its enactments, whether they constitute grants or limitations, are presumed to be stable and uniform, and to constitute a check on the more mutable sentiment and actions of members of different legislatures. And it seems to us that the result of such a

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construction would be a virtual removal of any constitutional inhibition on legislative power in this respect, leaving the legislative will as free and untrammelled as in those states where the legislatures are permitted to act in consonance with the inherent power of sovereignty, and no constitutional enactments have intervened. It was no doubt for the purpose of preventing enthusiastic legislation, practically destroying this limitation, that the question of public use was especially submitted to the courts, who are, and should be, ever watchful in maintaining inviolate the constitutional rights of the citizen.

It cannot be that, within the meaning of the constitution, the distinction between public policy and public use is to be obliterated. It might be of unquestionable public policy, and for the best interests of the state, to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade, increase property values, and thereby increase the revenues of the state, even if the enterprise was purely private; for such is the relation, under our form of government, between public and private prosperity that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was within the minds of the framers of the constitution; and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on grounds of public policy.

It seems scarcely necessary to particularize to show to what extent this doctrine might practically be carried. Under such liberal construction, the brewer could successfully demand condemnation of his neighbor's land for the purpose of the erection of a brewery, because, forsooth, many citizens of the state are profitably engaged in the

cultivation of hops. Condemnation would be in order for grist mills, and for factories for manufacturing the cereals of the state, because there is a large agricultural interest to be sustained. Tanneries, woolen factories, oil refineries, distilleries, packing houses, and machine shops of almost every conceivable kind, would be entitled to some consideration for the same reasons; thereby actually destroying any distinctions between public and private use, for the principle in one instance is the same as in the other; the difference is only in degree.

So many of the cases cited by both appellant and respondents have been decided on so many different theories and branches of the law that it is unprofitable to specially notice them here. There are, however, many cases that directly deny the doctrine laid down in the Nevada case, *supra*, and we think that the consensus of judicial opinion is opposed to such liberal construction. As showing the confusion which would arise from such a construction, in our sister state of Oregon, where large timber interests predominate, as they do in this state, it was held in *Aper Transp. Co. v. Garbade*, 32 Ore. 582, 52 Pac. 573, that the law providing that any corporation organized to transport timber or wood should have the right to construct railroads and tramways, which should be deemed for the public use, subject to corporate rights to toll, and gives such corporations the right of condemnation which railways possess, was void under the constitutional provision in relation to public use; the court saying that, while it is difficult to give an exact definition of public use, within the meaning of the constitution, no rule founded on the adjudged cases could be so framed as to include the case under consideration; citing *Lewis on Eminent Domain*, § 165; *Thompson on Corporations*, § 5593; *Cooley's Const. Lim.*, *p. 532; *Lumbering Co. v. Johnson*, 30 Ore. 205, 46 Pac. 790, 34

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L. R. A. 368, 60 Am. St. 818; and many other cases. In California it has been held that rights of way for mining purposes could not be condemned, under a similar constitutional provision. Much more in accordance with sound reasoning, and even with true public policy when considered in the broadest sense, is the language of the court in *Bloodgood v. Mohawk etc. R. Co.*, 18 Wend. 9, 31 Am. Dec. 313, where, in discussing this question, it is said:

“When we depart from the natural import of the term ‘public use,’ and substitute for the simple idea of a public possession and occupation, that of public utility, public interest, common benefit, general advantage or convenience, or that still more indefinite term public improvement, is there any limitation which can be set to the exertion of legislative will in the appropriation of private property. The moment the mode of its use is disregarded, and we permit ourselves to be governed by speculations, upon the benefits that may result to localities from the use which a man or set of men propose to make of the property of another, that moment we are afloat without any certain principle to guide us.”

And again, after announcing the contention that the improvement proposed was of great value and usefulness, productive of increase of comfort and convenience to individuals, and wealth and power to communities, the court said:

“But is this enough to justify the conclusion, that because the use to which it is dedicated by its owners accommodate individuals, and thereby advances the public interest, therefore it is such a public use that private property may be taken to promote it. Can the constitutional expression, public use, be made synonymous with public improvement, or general convenience and advantage, without involving consequences inconsistent with the reasonable security of private property; much more with that security which the constitution guarantees. If an incidental benefit, resulting to the public from the mode in

which individuals in pursuit of their own interest use their property, will constitute a public use of it, within the intention of the constitution, it will be found very difficult to set limits to the power of appropriating private property."

Mr. Cooley, in his Constitutional Limitations, and Mr. Elliott, in his work on Eminent Domain, have given this subject special attention, and reviewed all the authorities bearing thereon, and, while detached expressions from these authorities, frequently made with reference to cases cited, seem to sustain both contentions, yet the general deduction made is opposed to the idea that public use and public benefit are synonymous terms. Mr. Lewis, in discussing this identical proposition, in § 165, after giving a history of the earlier decisions, concludes as follows:

"*Public use* means the same as *use by the public*, and this it seems to us is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: *First*, that it accords with the primary and more commonly understood meaning of the words; *second*, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; *third*, it is the only view which gives the words any force as a limitation or renders them capable of any definite and practical application. If the constitution means that private property can be taken only for use *by* the public, it affords a definite guide to both the legislature and the courts;"

and much more to the same effect which it is not practical to insert in this opinion. Mr. Cooley, under the head of "The Purpose," page 652, says:

"Nor could it be of importance that the public would receive incidental benefits, such as unusually spring from the improvement of lands or the establishment of prosperous private enterprises; the *public use* implies a possession, occupation, and enjoyment of the land by the pub-

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lic at large, or by public agencies; and a due protection of the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it."

The citation of nearly all the cases bearing on this question will be found in Cooley's Const. Lim., and Lewis on Eminent Domain, and it is not necessary to reproduce them here. But from a consideration of all the authorities and from our own views on construction, we are of the opinion that the use under consideration must be either a use by the public, or by some agency which is quasi public, and not simply a use which may incidentally or indirectly promote the public interest or general prosperity of the state.

It is also contended by the appellant that, if the court should conclude that this was not such a public use as could be sustained, it has a right to this condemnation under the provision of the statute in relation to private ways of necessity. It is contended by the respondents that this action was not brought under the statute in relation to condemnation for private ways of necessity, and this seems to be true; but outside of this technical point the term private way of necessity" must be construed with reference to what was deemed a private way of necessity at the time of the adoption of the constitution; or, in other words, the common law definition of a private way of necessity. The rights asked for here do not fall within such definition. There is no element of a grant in this case upon which a private way of necessity is founded. "It is founded on an implied grant." 2 Blackstone's Commentaries (Hammond's Small ed.), 79.

"It is either created by express words or it is created by operation of law as incident to the grant, so that in both

cases the grant is the foundation to the title." 3 Kent's Commentaries, *p. 424 (14th ed.).

" . . . a way of necessity can only be raised out of land granted or reserved by the grantor, but not out of the land of a stranger. For, if one owns land to which he has no access except over lands of a stranger, he has not thereby any right to go across these for the purpose of reaching his own." 2 Washburn on Real Property, p. 320 (5th ed.).

"It has never, we think, been decided in any case that private property could be condemned for a private road for the exclusive use of the applicant, and we know of no principle upon which such a proceeding can be justified." Lewis on Eminent Domain, p. 233.

"A way of necessity, when the nature of it is considered, will be found to be nothing else but a way of grant. It derives its origin from a grant, for there seems to be no difference where a thing is granted by express words, and where by operation of law it passes as incident to the grant." Chitty's Notes to Blackstone's Commentaries, *p. 36.

"The statute authorizing the location of private roads, as far as it provides for the exercise of the right of eminent domain to establish them, is unconstitutional." *Wild v. Deig*, 43 Ind. 455, 13 Am. Rep. 399 (syllabus).

See also: *Dicky v. Tennison*, 27 Mo. 373; *Osborn v. Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Taylor v. Porter*, 4 Hill 140, 40 Am. Dec. 274; *Long v. Billings*, 7 Wash. 267, 34 Pac. 936.

We have not overlooked the motion of respondents to dismiss this cause on the ground that the order is not appealable, but, with the view we have taken on the merits of the case, it is not necessary to discuss the question raised in the motion, and for the reason that other cases of similar import are pending in this court, we thought it best to decide the case on its merits.

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The court not having committed error in sustaining the demurrer to the complaint, the judgment is affirmed.

FULLERTON, C. J., and ANDERS, MOUNT, and HADLEY, JJ., concur.

[No. 4783. Decided December 17, 1903.]

J. P. KIRBY, *Appellant* v. JOHN A. PEASE *et al.*, *Respondents*.¹

ACTIONS—BAR BY PREVIOUS SUIT—DISMISSAL—GROUNDS OF MOTION—PROHIBITED LITIGATION. Where the superior court has once litigated the question of the death of a party, and has been prohibited by the supreme court from relitigating the same, it is justified in granting a motion to dismiss an action brought to relitigate the question, as "impertinent, vexatious, and contemptuous," since any sufficient ground may be stated.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered April 6, 1903, dismissing an action as vexatious. Affirmed.

John M. Boyle and *Frank H. Graham*, for appellant.

R. F. Laffoon and *E. E. Cushman*, for respondents.

MOUNT, J.—This was an action to set aside a sale of real estate. It is alleged in the complaint, that in 1896 an action was commenced in the superior court of Pierce county wherein Henry Holgate was plaintiff and Samuel Parker and J. P. Kirby were defendants; that in February, 1898, before the issues were made up, the plaintiff therein, Henry Holgate, died and no administration was had upon his estate; that in the month of December, 1898, after the attention of the trial court had been called to the fact of the death of the plaintiff therein, a judgment was

¹Reported in 74 Pac. 665.

entered against the said defendant Kirby, and in favor of said Holgate; that on November 26, 1902, an execution was issued upon the said judgment, and the property described in the complaint was sold thereunder, and respondent Pease became the purchaser; that the judgment, and all proceedings had thereunder, were void because the plaintiff in the action was dead at the time the judgment was obtained.

When the respondents were served with the summons, they appeared and moved the court to dismiss the action, upon the ground that the action was "impertinent, vexatious, and contemptuous." This motion was supported by an affidavit showing that the question involved was *res adjudicata* in *Holgate v. Parker et al.*, wherein the question of the death of Holgate had been litigated, and that the lower court had been prohibited by this court, in *State ex rei. Holgate v. Superior Court*, 21 Wash. 33, 56 Pac. 932, from again trying the question whether Holgate was dead at the time the judgment was rendered. This motion was sustained and the action dismissed. Plaintiff appeals.

The only question discussed upon this appeal is that the grounds stated in the motion for dismissal are not grounds recognized by statute. It is true that the grounds stated in the motion, viz., that the action is "impertinent, vexatious, and contemptuous," are not designated by the code as grounds for the dismissal of an action. In fact, we find no provision of the code designating the grounds upon which an action may be dismissed. Any sufficient ground may therefore be stated. The affidavit accompanying the motion called the attention of the trial court to the fact that the parties to this action are the same, and the question of the death of Holgate the same, as in the case of *State ex rel. Holgate v. Superior Court*, wherein the trial court was prohibited from again trying that question. When

these facts appeared, the trial court was certainly justified in dismissing the action. It could not be required by a party to an action to violate an order of this court.

The judgment is therefore affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4866. Decided December 17, 1903.]

COLUMBIA & PUGET SOUND RAILROAD COMPANY, *Respondent*, v. CITY OF SEATTLE *et al.*, *Appellants*.¹

DEDICATION — INTENTION — PLATS — STREETS NOT DESIGNATED — PRESUMPTION. An intention to dedicate a street below the line of high tide at the west side of a plat will not be presumed from the fact that the streets at right angles thereto are not closed at this point, and are closed on another part of the plat, when a blank space is left and no street is designated there by name, or the boundaries marked, while the other streets are designated both by name and boundaries, and on the east side a street is so designated; especially in view of the law of Oregon territory in force at the time requiring the width and boundaries of streets to be designated on the plat, and since an intent to dedicate is not presumed and must clearly appear.

STREETS—PRESCRIPTION—USE OF PUBLIC NOT INCONSISTENT WITH PRIVATE USE—ACCESS TO PRIVATE WHARF AND DEPOT. Where a railroad company constructed and maintained piles and planking upon its land immediately adjoining its railway tracks and depot and maintained a roadway to its private wharf, the use thereof by the public for twenty years, for the purpose of gaining access to the tracks, depot, and wharf, was not inconsistent with private ownership and did not establish a public street by adverse usage.

SAME—RAILROADS—APPLICATION FOR FRANCHISE—ADMISSIONS. In such a case, an application for a franchise to build its railroad within the city including the land in dispute is not an admission that it is not the owner of the land.

DEED—CONSTRUCTION—ADVERSE POSSESSION—COLOR OF TITLE. A deed conveying all the grantor's land "in, upon or about" a certain

¹Reported in 74 Pac. 670.

townsite laid out by the grantor, is sufficiently broad and definite to constitute color of title to a strip of land thirteen feet in width immediately adjoining the west side of said plat within the patent line of the grantors donation claim.

Appeal from a judgment of the superior court for King county, Hatch, J., entered July 3, 1903, after a trial upon the merits before the court without a jury, quieting the plaintiff's title to premises and granting an injunction. Affirmed.

Mitchell Gilliam and William Parmerlee, for appellants, to the point that the plat showed a dedication of a street at the point in question, cited: *Webb v. Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; *San Francisco v. Center*, 133 Cal. 673, 66 Pac. 83; *Amador County v. Gilbert*, 133 Cal. 51, 65 Pac. 130; *Coe College v. Cedar Rapids* (Iowa), 87 N. W. 444; *Hanson v. Eastman*, 21 Minn. 509; *Sanborn v. Chicago etc. R. Co.*, 16 Wis. 19; *Indianapolis v. Kingsbury*, 101 Ind. 201; *Porter v. Carpenter*, 39 Fla. 14, 21 South. 788; *Yates v. Judd*, 18 Wis. 126; *Thompson v. Maloney*, 199 Ill. 276, 65 N. E. 236, 93 Am. St. 133.

Piles, Donworth & Howe, Charles H. Farrell, and *Charles S. Gleason*, for respondent.

HADLEY, J.—The appellant City of Seattle, through its co-appellants constituting the board of public works of said city, issued to the respondent a building permit granting leave to erect a building in said city. The permit was afterwards withdrawn, as far as it related to a portion of the land upon which respondent sought to build. This action was then brought to procure a mandatory injunction commanding appellants to forthwith cancel the revocation of the permit, and to issue another granting leave to erect the building upon the premise as described in respondent's ap-

plication. The prayer of the complaint also asks that, after such new permit shall have been issued, the appellants shall be perpetually enjoined from in any manner interfering with respondent in the erection of the building upon the said premises.

The controversy arises over a dispute as to the ownership of a strip of land thirteen and one-half feet in width adjoining the westerly line of lot 1, block 2, of Maynard's plat of the town, now city, of Seattle. The city claims that this strip is a part of a public street. Respondent disputes this, and alleges that it is the owner of the land, and that the same is not now, and never was, in a public street. This dispute is made an issue in the pleadings, and the complaint asks that respondent's title and possession shall be quieted as against appellants, and that they shall be perpetually enjoined from setting up any claim of title or right of possession to said premises. The cause was tried before the court without a jury, findings of facts and conclusions of law were made, and judgment was entered thereon to the effect that respondent is the owner in fee simple of the premises in dispute, that its title thereto is quieted as against appellants, and that the injunctive relief sought by respondent is granted. This appeal is from said judgment.

It is assigned that the court erred in making the following portion of its third finding of facts: "and by said plat the said Maynard did not intend to dedicate to the public anything west of said lot one (1), block two (2)." To make clear the contention under this assignment of error it is necessary to review somewhat the appearances as disclosed by the plat originally filed by Maynard. Said lot 1, block 2, is in the extreme western tier of lots as shown upon said plat. The plat shows that these lots extend into the waters of Elliott Bay, some being wholly and some partially

covered by water at ordinary high tide. Said lot 1, block 2, is wholly below the line of ordinary high tide, which line crosses the said block about the middle thereof, and extends in a northerly and southerly direction. It is conceded that said lot as platted, and also the strip in dispute in front of it, lie wholly within the patent line of the Maynard donation claim. By virtue of the disclaimer in the state constitution, as heretofore frequently held by this court, the tide land within the patent line became originally a part of the donation claim. The Maynard plat was made to cover lands within said donation claim. Lines are drawn upon the plat to indicate the west boundary of the lots and blocks, but the streets running in an east and west direction are not closed by lines at the westerly limit of the plat.

No street is designated upon the plat as being to the west of, and adjoining to, the row of lots and blocks above mentioned; but appellants reason that the intention to dedicate a street there may be inferred from the fact that, inasmuch as westerly boundary lines are designated for the lots and blocks and no lines there indicate the termini of the streets running east and west, it was therefore intended that the streets should continue beyond the line of the lots and blocks, and should connect with another street running parallel with, and abutting upon, the westerly line of the lots and blocks.

This argument of appellants is urged as being emphasized by a further indication appearing upon the plat. The eastern portion of the plat is wider than the extreme western portion. Three rows of blocks on the southerly side of the plat extend but little more than half the distance of the full length of the plat on the north. At the west end of said shorter portion of the plat, a continuous line is drawn, which bounds the lots and blocks, and closes the streets

running east and west at that place. It is therefore urged that by drawing the line across the streets in that portion of the plat, the intention to close them without any connection to the west is clear, and that the absence of such a line at the further westerly extremity of the plat indicates an intention to leave the streets open to connect with another running at right angles to them. Upon the other hand, respondent contends that, since across the extreme side of the plat a street is designated both by boundary line and by name, the absence of such designation on the west, either by boundary lines or by name, shows an intention not to dedicate a street on the west side of the plat.

While the intention of the person making the dedication is to be determined largely from what appears upon the plat, yet resort must also be had to the law regulating the filing of plats, and the intention must be determined from what the plat shows in connection with requirements of law necessary to a dedication. The Maynard plat shows that it was executed May 23, 1853. The territory now comprised by this state was, prior to March 2, 1853, a part of the then territory of Oregon, the act of congress creating the territory of Washington having been passed on said date. The new territory was, however, not organized at the time the Maynard plat was filed, and the first session of the territorial legislature did not convene until February 27, 1854. The plat was therefore governed by the laws of Oregon territory, as they existed at the time it was filed. The session laws of that territory for 1850-51, pages 260, 261, contain an act "in respect to the recording of town plats." That law was in force when the Maynard plat was filed. Section 1 of the act is as follows:

"Any person or persons, his, her, or their legal representative, who may hereafter lay off any town within this territory, shall, previous to the sale of any lots in such

town, cause to be recorded in the recorder's office of the county wherein the same may lie, a correct copy of the plat of said town, with the public grounds (if any there be), streets, lanes, and alleys, with their respective widths properly marked, and the lots regularly numbered in numerical order, and the size of the lots marked by reference to the plat of said town."

It will be observed that the section requires that streets with their respective widths shall be properly marked. This was not done by the dedicator of the Maynard plat, at the place where appellants claim he intended to dedicate a street. A blank space is left there, without any marked boundaries or any designation by name. Other streets and alleys are distinctly marked by boundary lines, and the streets also by names. Maynard must be presumed to have known the requirements of the law, and, inasmuch as he so carefully complied with it in designating streets and alleys at other places, and with as much apparent care omitted to designate one at the place in question, we think, when the law and the plat are considered together, it should not be held that he intended to dedicate a street which he in no way designated.

Appellants cite a number of cases which they urge in support of the rule that, in the interpretation of plats, force must be given to the lines appearing thereon, and that they are often as potent to convey the intention of the dedicator as the written words. The rule urged is well recognized, and is founded in good reason. But applying it to the plat in question, it appears to us that the lines made upon this plat silently say that Maynard intended to designate the streets which he indicated by lines as well as by names, and that he did not intend to dedicate more. We do not think it can be concluded, because a line was drawn closing streets at one place, and such does not appear as

closing others at another place, that it follows from such fact that an intention existed to dedicate a street, merely for the reason that it would connect at right angles with the others; and especially is this true in view of the statutory requirements that the street intended to be dedicated must be marked.

Appellants rely largely upon the case of *Webb v. Demopolis*, 95 Ala. 116, 13 South. 289, 21 L. R. A. 62. In that case the platted land was in front of the Tombigbee river, and the contention was over an irregular space immediately in front of the margin of the stream. That space was, however, designated upon the plat as "Arch street," thus showing clearly an intention that a street should exist there. It is contended, however, by appellants that the opinion shows it would have been held to be a street even though it had not been so designated. The opinion does proceed argumentatively to state that all the plats of the city of Demopolis had recognized the marginal front of the river as a continuous street, but the fact remained that the somewhat irregular space following the river had actually been designated upon the plat then under examination as a street, and that was the conclusive fact which showed an intention to dedicate it as such. An intention to dedicate will not be presumed, and a clear intention must appear. *Shell v. Poulson*, 23 Wash. 535, 63 Pac. 204; *Tinges v. Baltimore*, 51 Md. 600; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484; *Holdane v. Trustees etc.*, 21 N. Y. 474; *Fisher v. Carpenter*, 36 Kan. 184, 12 Pac. 941; *Chicago v. Van Ingen*, 152 Ill. 624, 38 N. E. 894; *Emmons v. Milwaukee*, 32 Wis. 434; *Hogue v. Albina*, 20 Ore. 182, 25 Pac. 386, 10 L. R. A. 673.

From anything appearing upon the Maynard plat, which is the evidence before us, on the subject of the original dedication, we shall not, for the foregoing reasons, disturb the

finding of the trial court that Maynard did not intend to dedicate to the public anything west of lot 1, block 2.

Appellants contend, however, that if the strip of land in question was not originally dedicated by the Maynard plat, it has since been dedicated by permitting it to be uninterruptedly used by the public as a highway. It is therefore assigned that the court erred in finding, that for more than twenty years prior to the commencement of this action, the respondent and its predecessors and grantors have together been exclusively in possession of the disputed tract, under color of title; that no part thereof has ever been used by the public as a street or alley against the will of respondent, its predecessors, and grantors; and that the public or the city of Seattle never acquired any interest in said premises or any part thereof. It was further found that during the possession of respondent, its predecessors, and grantors, the said premises were occupied by piles with planks laid thereon, which were constructed by respondent, its predecessors, and grantors.

We think the findings are sustained by the evidence. During the time mentioned, respondent had occupied the land immediately adjoining the strip in question with its railway tracks and depot; and, leading from said lot 1, it had, together with its predecessors, and grantors, maintained a roadway westward over the waters of Elliott bay to a private wharf, which it owned and operated. The disputed tract was, it is true, used by the public, but for the purpose of gaining access to the railway tracks, depot, and wharf of respondent, all of which were private property. The use was permitted by respondent in connection with the prosecution of its business as a railway and wharfage company. Such use was private in its nature, was not inconsistent with the assertion of private ownership, and did not of itself establish adverse usage by the public. We

think no assertion or conduct of respondent is shown which is inconsistent with the idea of ownership or of mere permissible use.

It is pointed out by appellants that respondent applied to the city for a franchise to build its railroad within the city, and that its application included the land in controversy. We do not think that fact can be said to be an admission that it was not the owner of this strip. The entire route of the proposed line was necessarily shown, and the privilege of operating the proposed line under restrictions within the city was involved, as well as the right to build upon certain streets. The substructure for this planking and roadway over this land was built and maintained by respondent at its own expense. There is evidence to the effect that the city street officials had asked that the planking be repaired. But, in any event, respondent kept it continually repaired, and maintained it at its own expense over the disputed strip, thus furnishing a roadway to its private property.

"And such we think is the voice of authority generally that, before an easement can be implanted upon land, the property of a citizen, where such right rests upon prescription, the user by the public must have been uninterrupted, unqualified, and adverse to the rights of the owner of the soil." *Shell v. Poulson, supra*.

In *Megrath v. Nickerson*, 24 Wash. 235, 240, 64 Pac. 163, the court said:

"It was not a free and untrammelled use, but was a use which was interrupted by unambiguous acts of ownership. Neither does the testimony show that the use was adverse. On the contrary it does show that it was permissive and subordinate to private ownership."

We think it is equally established in the case at bar that the use was "permissive and subordinate to private ownership" within the principles enunciated in the following

cases: *Irwin v. Dixon*, 9 How. 10, 13 L. Ed. 25; *City of Eureka v. Croghan*, 81 Cal. 524, 22 Pac. 693; *Cooper v. Monterey County*, 104 Cal. 437, 38 Pac. 106; *Nelson v. Madison*, Fed. Cas. No. 10,110; *Coburn v. San Mateo County*, 75 Fed. 520; *Dicken v. Liverpool etc. Co.*, 41 W. Va. 511, 23 S. E. 582; *Lewis v. City of Portland*, 25 Ore. 133, 35 Pac. 256, 22 L. R. A. 736, 42 Am. St. 772. In the last named case the language of the court, at pages 154 and 155, is a comprehensive statement of the principles applied here, and is as follows:

"A dedication of land to the public use rests on the intention or assent of the owner. As it is purely a question of intention, the evidence of it, when resting in parol, must be clear and satisfactory, and indicate a positive and unmistakable intention to devote the property to public use. All the authorities agree that the acts and conduct of the owner, when relied upon to show the dedication of his property, must be deliberate and unequivocal, manifesting a clear intention to abandon such property to the public use. The burden of showing it rests on the defendant. The security of titles requires that the evidence of dedication, when depending on parol proof, should be of such a deliberate and decisive character as to leave no doubt of the owner's intention. Hence, the rule is well settled by numerous authorities that before there can be a valid dedication there must have been an actual intention, clearly indicated, by deliberate and unequivocal words or acts, to dedicate the property to the public."

We shall therefore not disturb the court's findings, which are to the effect that the land in question has not been used by the public adversely to respondent's claim of ownership.

A number of conveyances were introduced in evidence in support of respondent's claim and color of title. Appellants assign as error that a deed from David S. Maynard and wife to Angus Mackintosh was admitted. It is alleged that the description in the deed is too indefinite to convey

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title. The language relied upon by respondent is the following:

"All our right, title and interest in and to all lots, tracts, pieces, parcels, blocks, or portions of land in, upon, or about that portion of the city of Seattle as laid out by David S. Maynard and known as David S. Maynard's Town of Seattle, excepting . . ."

Certain described lots and blocks are then named as included in the exception. The language is general, but it was manifestly the intention to convey all lands of the grantors "in, upon, or about" that portion of Seattle covered by the Maynard plat except the lots and blocks named. The description appears to be broad enough to include the strip of land in question. It lies immediately adjoining the west line of the Maynard plat, and within the patent line of the Maynard donation claim. It is therefore included in the general description, since it is not within the exception, and can be ascertained with certainty as being a part of the grantor's lands "about" the Maynard plat. In construing descriptions effect must be given to the intention of the parties, and to that end, that shall be considered certain which can be made certain. 4 Am. & Eng. Enc. Law, pp. 793, 794.

We believe the deed was properly admitted as evidence of color of title, and we think, from all the evidence in the record, that respondent and its grantors held uninterrupted possession of the disputed land, under claim and color of title, for more than twenty years prior to this action.

The judgment is affirmed.

ANDERS, DUNBAR, and MOUNT, JJ., concur.

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38 317

[No. 4788. Decided December 17, 1903.]

ANNA GROUT *et al.*, *Appellants*, v. TACOMA EASTERN RAILROAD COMPANY, *Respondent*.¹

MASTER AND SERVANT—RAILROADS—NEGLIGENCE—DEATH OF BRAKEMAN—DEFECTIVE COUPLING—PLEADING—COMPLAINT—SUFFICIENCY. A complaint alleging the death of plaintiff's decedent, a brakeman, through the negligent use of a defective pin and draw bar in making an unusual and dangerous coupling between a steam shovel and a construction train, states a cause of action where it alleges that the pin was defective in being worn so smooth that it would not hold, that upon complaint, the conductor of the train looked at the coupling, declared it safe, and ordered the brakeman between the cars to set the brakes, which he did, relying upon the conductor's assurance, whereupon he was killed owing to the giving way of the coupling through the defects aforesaid, since there is nothing in the complaint to show that the brakeman made the coupling, or had notice of the nature thereof, or of the defects in the pin.

PLEADINGS—LIBERAL CONSTRUCTION. A complaint is to be liberally construed upon demurrer and all reasonable intendments made in its favor.

MASTER AND SERVANT—ASSUMPTION OF RISKS—INVESTIGATION BY MASTER. The doctrine of assumption of risks imposes no duty upon the servant to make an investigation, where the defect was sufficiently apparent to be the subject of discussion and the master, after examination, pronounced it safe.

SAME—RAILROADS—FELLOW SERVANTS—CONDUCTOR OF TRAIN A VICE-PRINCIPAL. The conductor of a construction train and his brakeman are not fellow servants, but the former is a vice-principal.

SAME—ASSUMPTION OF RISK—INSUFFICIENT NUMBER OF MEN. A brakeman assumes all risks from the negligence of a railroad company in failing to furnish a sufficient number of brakemen to operate the train.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered May 9, 1903, upon sustaining

¹Reported in 74 Pac. 665.

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Citations of Counsel.

a demurrer to the complaint, dismissing an action for the death of a brakeman caused by a defective coupling and pin. Reversed.

Govnor Teats and *James B. Reavis*, for appellant. The judgment of the servant is subservient to the master's, where, upon discussion, the master assures him that there is no danger. *Green v. Western American Coal Co.*, 30 Wash. 87, 70 Pac. 310; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Goldthorpe v. Clark-Nickerson L. Co.*, 31 Wash. 467, 71 Pac. 1091; *Harder etc. Min. Co. v. Schmidt*, 104 Fed. 282; *Gunlach v. Schott*, 192 Ill. 509, 61 N. E. 332, 85 Am. St. 348. The servant does not assume the risks when acting under orders to do a particular act. *Dallemand v. Saalfeldt*, 175 Ill. 310, 48 L. R. A. 753, 67 Am. St. 214; *Stephens v. Hannibal etc. R. Co.*, 96 Mo. 207, 9 S. W. 589, 9 Am. St. 336; *Moline Plow Co. v. Anderson*, 19 Ill. App. 417; *Hawley v. Northern etc. R. Co.*, 82 N. Y. 370; *Illinois Steel Co. v. Shymanowski*, 162 Ill. 447, 44 N. E. 876; *Norfolk etc. R. Co. v. Ampey*, 93 Va. 108, 25 S. E. 226; *Louisville etc. R. Co. v. Utz*, 133 Ind. 265, 32 N. E. 881; *Central R. Co. v. De Bray*, 71 Ga. 406; *Long's Adm'r v. Illinois Cen. R. Co.* (Ky), 58 L. R. A. 237; *Texas etc. R. Co. v. Lewis* (Tex. Civ. App.), 26 S. W. 873; *Norfolk etc. R. Co. v. Ward*, 90 Va. 687, 19 S. E. 849; 44 Am. St. 945; *Shroeder v. Chicago etc. R. Co.*, 108 Mo. 322, 18 S. W. 1094; *Patton v. Western etc. R. Co.*, 96 N. C. 455, 1 S. E. 863.

E. M. Hayden, for respondent, to the point that the orders of the conductor did not relieve the deceased from the assumption of known risks, cited: Note to *Dallmand v. Saalfeldt*, 48 L. R. A. 755; *Linch v. Sagamore Mfg. Co.*, 143 Mass. 206, 9 N. E. 730; *Welch v. Brainard*, 108 Mich. 38, 65 N. W. 667; *Tuttle v. Detroit etc. R. Co.*, 122 U. S.

189, 7 Sup. Ct. 1166; *Jones v. Galveston etc. R. Co.*, 11 Texas 39, 31 S. W. 706; *Bradshaw's Adm'r v. Louisville & N. R. Co.*, 14 Ky. L. 688, 21 S. W. 346; *Gulf etc. R. Co. v. Hohl* (Tex. Civ. App.), 29 S. W. 1131. Where reasonable men cannot differ as to the obvious dangers, the servant cannot rely on the master's assurance that there is none. *Johnson v. Anderson etc. L. Co.*, 31 Wash. 554, 72 Pac. 107.

FULLERTON, C. J.—This action was brought by the widow and minor children of William Grout, deceased, to recover damages for his death, caused, as they allege, by the wrongful and negligent acts of the respondent. A general demurrer to the complaint was interposed, and sustained, and this appeal is from a judgment of dismissal, entered after the appellants had elected to stand on their complaint, and had refused to plead further. The ultimate question therefore is, do the facts stated entitle the appellants to recover.

In substance it is alleged in the complaint, that the respondent is a railroad corporation operating a railroad, and that the deceased was a brakeman in its employ, and at the time of his death was engaged in that capacity on a construction train of the respondent, consisting of an engine and two flat cars equipped with air brakes; that the company, on the day Grout met with his death, had in use at a gravel pit near its main line a steam shovel, standing on a temporary side track leading from its main line down into the gravel pit; that the steam shovel stood upon a car or trucks of its own, and was moved from place to place along the respondent's line by being hitched to the construction train, and hauled as cars are ordinarily hauled: that the shovel had been, and was, equipped with a coupling and bumper similar to that in common use, but which could

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not be used in the ordinary way owing to the fact that the respondent had fastened on to the car carrying the shovel a coal box, which extended over its end far enough to overlap the coupling and prevent another car from being brought near enough to it to couple by link and pin; that, to overcome this difficulty, the respondent had equipped the steam shovel with a draw bar, "which has been many years ago, and was, on said day, considered dangerous by operators of trains, and has long ago been discarded by railroad companies and the users of trains and steam shovels, for the reason that experience has shown the same to be dangerous to life and limb, and totally unfit for use;" which draw bar was about $4\frac{1}{2}$ feet in length, and extended from the coupling on the car or truck that held the steam shovel through the coal box a distance sufficient to permit another car to be coupled thereto. It is then alleged, that on the 1st day of October, 1902, the respondent sought to move the steam shovel from the place in which it then was to some other point on its line, and to that end sent the construction train, on which Grout was brakeman, to haul the same; that, when they sought to make the coupling between the steam shovel and the construction train, it was found that the coal box held the draw bar too high to permit its being coupled into the coupler in the ordinary way; whereupon the conductor of the construction train directed that it be coupled by placing the bar on top of the coupler, and placing a coupling pin down through the bar into the coupling. The complaint then proceeds as follows:

"That the said defendant carelessly and negligently failed to have furnished with the said train or steam shovel, a fit and safe pin for the purpose of making the coupling of the said draw bar upon top of the said coupling, and negligently and carelessly furnished the said train crew with a pin, defective in this—that said pin, so furnished and supplied by the said defendant, was worn, and the

head of the same was so worn that the pin, when the train was moved, would work down through, and the head of the same would work down through the hole in the draw bar so placed upon the said coupling.

"That when the said coupling was made, as herein set out, complaint was made that the said pin would not hold, that the said coupling was dangerous; whereupon the said conductor, who had charge of the said train, and the coupling and moving of the said steam shovel, looked at the said coupling and told the deceased that the coupling was good, that it would hold, that it was safe, and ordered the deceased between the said cars and the said steam shovel to manage the said angle-cock or cutoff, which set the brake, and ordered the said deceased to cut off the air and set the brakes at any moment he heard a shout or signal; and thereupon the said deceased, believing that the same was safe, and relying upon the assurance of the conductor, went between the car and the said shovel, as was necessary for him to do in order to work the said angle-cock or cutoff, after they had moved the said steam shovel a few feet, and while going at the rate of about three miles per hour, a shout or signal was given, which deceased took to be, under his instructions, an order to set the brakes by the said angle-cock or cut-off; whereupon the deceased, in obedience to the signal, put on the brakes of the said cars and locomotive, stopping the same; whereupon, due and owing to the momentum of the said steam shovel coming towards the said car, and due and owing to the said defective coupling, and due and owing to the said defective pin so furnished and supplied by the said defendant company and used by and under the orders and instructions of said conductor, the pin so furnished dropped down through the said slot or hole in the said draw bar, permitting the said steam shovel to come upon the said deceased, catching him between the said cars and the said coal box, so negligently and carelessly placed upon the said steam shovel by the said defendant, breaking the neck of the deceased, killing him instantly."

It is further alleged that the respondent failed to furnish

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a sufficient number of brakemen to do the work required in handling a steam shovel, and that the company's negligence in that regard led to the death of Grout. There was also a general allegation to the effect that Grout was a brakeman of wide experience and long service, and was capable of earning \$85.00 per month at his occupation.

The learned judge of the trial court held, and the respondent contends in this court, that, on the facts stated in the complaint, there can be no recovery, because the danger which caused the injury and death of Grout was so apparent and obvious that he must be held to have assumed the risk. Indeed, the respondent argues that the task which the appellant undertook to perform was, under the circumstances, so fraught with imminent peril that any novice would say that a man doing such a thing was taking his life in his hands, and that the danger to an experienced brakeman must have been the more obvious.

If it were true that the person killed knew at the time he obeyed the order of the conductor to go between the cars and set the brakes on a given signal, that the coupling was such as it is described to have been in the complaint, and knew further that the signal given was not a signal to put on the brakes, but did do those things in spite of his knowledge, then the argument of counsel would have much to support it, and perhaps the judgment of the trial court would properly follow. But when the complaint is examined it will be found that it is nowhere alleged that he had any such knowledge. It is true that it is alleged that he was the only brakeman, that the conductor "gave orders" for the coupling to be made in the particular manner it was made, and that when complaint was made that the coupling was dangerous the conductor "looked at" it and told the brakeman that it was safe;

and it may be that, by a process of deductive reasoning from these allegations, it can be inferred that Grout made the coupling, and must therefore have known of the dangers incurred in entering the space between the cars.

Yet it is not alleged directly that he made the coupling, nor is it alleged directly that he made the complaint that the coupling was not safe. On the contrary, it is alleged that he believed it safe, and entered upon the performance of the task imposed on him so believing and relying on the conductor's assurance that it was safe; and it is perfectly clear that all of the allegations of the complaint concerning the manner in which the train was coupled on to the shovel at the time of the accident can be true, yet the victim of the accident be entirely ignorant of the manner of that coupling, except perhaps in so far as it was directly visible to the eye. But how much would be thus visible is not shown by the complaint. A casual inspection would, of course, show that the connection between the cars was made by a draw bar, and that the draw bar was fastened to the top of the coupler instead of into the slot according to the usual manner, but it is not to be inferred from this that the defective coupling pin, the defect that directly caused the accident, was in plain view. The inference naturally flowing from the allegations made is the other way. It is alleged that the conductor of the train, whose duty it was to see that the proper appliances were used, "looked at" the coupling, and pronounced it safe. Surely, if the defect was in plain view, it cannot be that he would have failed to discover it, even though he did no more than look at it.

Unless, therefore, we are bound to construe the allegation of the complaint most strongly against the pleader, and draw and apply against his interest every inference

capable of being drawn therefrom, whether in accord with the positive allegation or not, we cannot say that it appears from the complaint that Grout had knowledge of the defects relied upon to show negligence on the part of the respondent. But we think we are neither required nor permitted to construe pleadings in this manner. By the rule of the Code, a pleading must be liberally construed with a view to substantial justice between the parties, and, giving effect to this rule, we have said that under the code practice it is no longer the rule that a pleading must be most strongly construed against the pleader. *Isaacs v. Holland*, 4 Wash. 54, 29 Pac. 976. The late territorial court, also, in *Chambers v. Hoover*, 3 Wash. T. 107, 13 Pac. 466, speaking through Mr. Justice Turner, gave the statute a similar construction, using the following language:

“The averments of this pleading are *vague* and *indefinite*, and it is defective in other respects; yet, when bolstered by the rule of liberal construction commanded by the Code, we think we discern a cause of action. A suitor is no longer to be turned out of court, if by making all reasonable intendments in his favor enough can be seized hold of in his pleadings to show that he has rights which ought to be enforced. He may be required on motion to conform his statement to the rules of good pleading, and if he refuse, may be turned out of court; but as against a demurrer, the office of which is to raise a substantial issue on the law of the case, and not on the law of practice and pleading, evidentiary facts, and even inferences from averments amounting to mere conclusions of law, will be considered in his favor.”

And since that time this court has in many cases announced its adherence to the rule of a liberal construction of the pleadings, and to a natural rather than a strained construction of the language used. *King v. Ilwaco etc.*

Nav. Co., 1 Wash. 127, 23 Pac. 924; *Johnson v. Leonard*, 1 Wash. 564, 20 Pac. 591; *Lee v. Lee*, 3 Wash. 236, 28 Pac. 355; *Rourke v. Miller*, 3 Wash. 73, 27 Pac. 1029; *Rathbone v. Frost*, 9 Wash. 162, 37 Pac. 298; *Davis v. Ford*, 15 Wash. 107, 45 Pac. 739, 46 Pac. 393; *Townsend v. Price*, 19 Wash. 415, 53 Pac. 668; *Harris v. Halverson*, 23 Wash. 779, 63 Pac. 549. In the last case Judge White, speaking for the court, said:

"The true doctrine is that every reasonable intendment and presumption is to be made in favor of the pleading, and if substantial facts which constitute a cause of action are stated in the complaint, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are conclusions of law, or otherwise imperfect, incomplete, and defective, such insufficiency pertaining to the form rather than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment."

Applying these rules to the complaint before us, we think it going too far to say that it appears therefrom that the brakeman Grout participated in the act of coupling the cars, or that he knew of the particular defect which is alleged to have been the direct cause of the accident, especially as against the positive allegation in the complaint to the effect that he believed it to be safe and relied upon the assurance of the conductor that it was so.

But it is strenuously argued that enough did appear to put Grout, who was an experienced brakeman, upon his guard, and make it his duty to examine the coupling, and that, if he took the dangerous post after being thus warned, without examination, he must be held to have assumed the risk of injury. Doubtless it is true that a servant who enters upon the performance of a dangerous task, after

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having been warned or otherwise made aware of the danger attending upon its performance, assumes the risk of injury therefrom, even though the danger be one which the master was bound to guard against his voluntarily assuming; but this rule imposes upon the servant no duty of investigation, after he has been expressly told by the master that performance involves no risk.

A master is in law bound as a primary duty to either furnish his servant with a reasonably safe place in which to work, and reasonably safe appliances to work with, or make the servant fully acquainted with the dangers caused by his non-performance of that duty, before the servant enters the place of work or commences to use the appliances. This rule places upon the master the initiative. The duty is on him in the first instance to discover and remedy, or make known, the defects, and it requires no affirmative act of the servant to cast upon him liability for his non-performance of that duty. Hence, when a defect actually exists, and the servant is ignorant of the true conditions, or if the defect is sufficiently apparent to cause discussion between the servant and the master, and the latter informs him that it involves no unusual hazard, he is under no obligation to make an investigation of his own to hold the master responsible for an injury caused by the defect. This is the general rule, if not the rule of all of the cases. *Goldthorpe v. Clark-Nickerson Lumber Co.*, 31 Wash. 467, 71 Pac. 1091, and cases cited. In this case, therefore, though it be true that the defect causing the injury was sufficiently apparent to cause discussion, the brakeman was under no obligation to examine it after the conductor, who represented the master, had done so and pronounced it safe.

The last contention is that the brakeman and conductor

were fellow servants, and hence there could be no liability on the company, because the negligence causing the injury was the negligence of a fellow servant. It is admitted that this court, following, or at least citing with approval, the earlier decisions of the Supreme Court of the United States, has held to the contrary doctrine, but it is urged that inasmuch as that court has changed its holdings in that regard we ought not to feel bound by our own earlier cases. But this court has announced its adherence to the older rule since the federal court announced its change of opinion, not in ignorance of, but in spite of, that change of opinion. *Howe v. Northern Pac. Ry. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949. The reasons why we adhere to the rule are fully stated in that case, and need not be repeated here.

The allegation of the complaint to the effect that the company failed to furnish a sufficient number of brakemen to properly perform the services required in operating the train, does not state actionable negligence. This was a matter plainly apparent to the brakeman employed, and as he continued in the service with knowledge of the fact, he assumed all the risks arising therefrom.

The judgment appealed from is reversed, and the cause remanded with instructions to reinstate the case, and give the defendant leave to answer to the merits within such time as to the trial court may seem just.

HADLEY, MOUNT, DUNBAR, and ANDERS, JJ., concur.

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Citations of Counsel.

[No. 4816. Decided December 17, 1903.]

THE STATE OF WASHINGTON, *on the Relation of F. J.*
Clark, v. JEREMIAH NETERER, as Judge of the Su-
*perior Court for Whatcom County, Respondent.*¹

TRIAL BY JURY—WAIVER—NONPAYMENT OF JURY FEE. LAWS 1903, p. 50, requiring an advance payment of \$12 as a jury fee in civil cases, and providing that its nonpayment shall be deemed a waiver of the right to a jury trial, is not in conflict with Const. art. 1, § 21, providing for the waiver of a jury trial only where consent thereto is given, since consent may be either express or implied, as recognized by the laws in force at the time of the adoption of the constitution.

SAME—REASONABLENESS OF FEE. The jury law of 1903, p. 50, providing for a \$12 jury fee in civil cases is not unconstitutional as imposing any unreasonable conditions upon the right of trial by jury.

Application to the supreme court, filed September 16, 1903, for a writ of mandamus compelling the respondent, as judge of the superior court for Whatcom county, to set a cause for trial before a jury. Writ denied.

Marshall P. Stafford, for relator. The constitution uses "waiving" in its technical legal sense. *Mauer v. Mitchell*, 53 Cal. 289; 6 Am. & Eng. Enc. Law, 925 (2d ed.); *Cooley, Const. Lim.*, 73 (5th ed.). What acts constitute a "waiving" is purely a judicial question. *Wynehamer v. People*, 13 N. Y. 378; *Commonwealth v. Proprietors etc.*, 68 Mass. 339; *Beebe v. State*, 6 Ind. 501; *Barnes v. Barnes*, 53 N. C. 366; *Cameron v. Kenfield*, 57 Cal. 550; *Farmers' Co-Op. Union v. Thresher*, 62 Cal. 407. Both parties refused to give their consent; the legislature can not declare a thing to be a fact when it is not such fact. *Wynehamer v. People, supra*; *Grimm v. Weissenberg*

¹Reported in 74 Pac. 668.

School Dist., 57 Pa. St. 433. The statute compels a trial without a jury and this is beyond the power of the legislature. *North Pa. Coal Co. v. Snowden*, 42 Pa. St. 488; *Tillmes v. Marsh*, 67 Pa. St. 507; *Haines' Appeal*, 73 Pa. St. 169; *Barnes v. Barnes*, *supra*; *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194; *Bernheim v. Waring*, 79 N. C. 56; *Kinkaid v. Hiatt*, 24 Neb. 562, 39 N. W. 600; *Kuhl v. Pierce County*, 44 Neb. 584, 62 N. W. 1066; *United States v. Rathbone*, 2 Paine 578, Fed. Cas. No. 16,121; *Howe Machine Co. v. Edwards*, 15 Blatchf. 402 Fed. Cas. No. 6,784.

Parker Ellis, for respondent, cited: *State v. Cross*, 12 Iowa 66; *Huntley v. Holt*, 58 Conn. 445, 20 Atl. 469; *Conneau v. Geis*, 73 Cal. 176, 14 Pac. 580; Notes to 1 L. R. A. 480, and 632, and 3 L. R. A. 210.

MOUNT, J.—Application for writ of mandamus. The relator is plaintiff in a civil action triable by jury. The case is at issue, and ready for trial in the superior court of Whatcom county. The respondent is judge of that court. September 5, 1903, was a day appointed for setting jury cases for trial in that court. On that day the parties to said action appeared in court, and the relator requested the court to set the case for trial. Neither party had served or filed the statement, or deposited the fee, required by the act of March 6, 1903, relating to jury trials. Laws 1903, p. 50. For that reason the court refused to set the case for trial before a jury. Upon application made here, this court issued an alternative writ of mandamus, directing respondent to set the case for trial, or to show cause why he should not do so.

The only question presented upon the return to the writ is the constitutionality of the act 1903, above referred to. It is contended by the relator that the act is

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unconstitutional because it is repugnant to § 21, art. 1, of the constitution, which reads as follows:

"The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

The statute of 1903 is as follows:

"§ 1. In all civil actions triable by a jury in the superior court any party to the action may, at or prior to the time the case is called to be set for trial, serve upon the opposite party or his attorney, and file with the clerk of the court, a statement of himself, or attorney, that he elects to have such case tried by jury. At the time of filing such statement such party shall also deposit with the clerk of the court \$12. Unless such statement is filed and such deposit made, the parties will be deemed to have waived trial by jury, and consented to a trial by the court.

"§ 2. The amount deposited by the party demanding a trial by jury shall be a part of the taxable costs in such action. The amount received by the clerk on account of jury fees shall be accounted for as such other fees received.

"§ 3. § 5028, Ballinger's Code, and all other acts in conflict with this act are hereby repealed."

The section of the constitution above referred to clearly authorizes the legislature to provide for "waiving of the jury in civil cases where the consent of the parties interested is given thereto." Under this provision it is quite clear that there can be no waiver of a jury trial in civil causes where there is no consent of the parties, express or implied, and the controlling question here is, may the legislature provide for any other consent than express consent? If not, then the act in question must be declared unconstitutional. It is argued by the relator that the word "waiving" implies consent, and that the words

"where consent . . . is given," as used here, necessarily mean express consent, and that the legislature therefore may not provide for an implied consent, as has been done in this act.

It seems to be the general rule that the provisions found in the constitutions of nearly all the states of the Union, as follows: The right of trial by jury shall remain inviolate—means that "the right is preserved in substance as it existed at the time of the adoption of the constitution, and in the classes of cases to which it was then applicable." 6 Am. & Eng. Enc. Law, p. 974 (2d ed.), and cases cited. It is also "generally conceded that in civil actions and proceedings, and in the absence of constitutional or statutory inhibition, the right of a party to have the issues of fact in a cause determined by a jury, is a privilege of such a nature that he may waive it if he chooses." 17 Am. & Eng. Enc. Law, p. 1097 (2d ed.), and cases cited. The form and manner of such waiver is usually regulated by statute, and where there is no provision in the constitution prohibiting such legislation, it is upheld. *Garrison v. Hollins*, 2 Lea (Tenn.) 684; *Copp v. Henniker*, 55 N. H. 179, 20 Am. Rep. 194.

We have compared this provision of our constitution with similar provisions in constitutions of nearly all the other states, and find no other provision exactly the same as ours. In Arkansas, California, Colorado, Idaho, Michigan, Minnesota, Montana, New York, Nevada, Texas, and Wisconsin, the substance of the provision relating to jury trials in civil cases is, "trial by jury shall remain inviolate, but a jury trial may be waived by the parties in the manner prescribed by law." In these states it is clear that an act such as the one under consideration is a valid exercise of legislative authority. In most of the other states the provision, "the right of trial by jury shall

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remain inviolate," stands without modification as in the states above named. But it is held, however, that a party waives his constitutional right by a neglect to comply with the regulations prescribed by law. *Commonwealth v. Whitney*, 108 Mass. 5; *Wilkins v. Treynor*, 14 Iowa 391; *Merrill v. City of St. Louis*, 83 Mo. 244, 53 Am. Rep. 576. Mr. Freeman, in his note to *Flint River Steamboat Co. v. Roberts*, 48 Am. Dec. 178, at page 186, says:

"The provisions in the several state constitutions, guaranteeing the right of trial by jury, differ somewhat in form. But the general principle contained in all of them is, that the right of trial by jury as known and exercised by the people of the state, at the time of the adoption of the constitution, shall be preserved and guaranteed to them under the constitution. In order, therefore, to determine in what cases the right to trial by jury in any particular state exists, it is necessary to definitely ascertain what was the extent of the right to that mode of trial, under the established law and practice of that state, at the time when it adopted its constitution."

Authorities are cited in support of this rule, amply sustaining it. It is applicable we think to the construction of the section of our constitution under consideration. The statutes bearing upon the question of waiver in force at the time our constitution was adopted were as follows:

"The waiver of a jury or agreement to refer shall be by stipulation of the parties filed, or the oral consent of the parties given in open court and entered in the records." Bal. Code, § 4969; Code 1881, § 204.

"Trial by jury may, with the assent of the court, be waived by the several parties in the manner following: (1) By failing to appear at the trial. (2) By written consent in person or by attorney, filed with the clerk. (3) By oral consent in open court, entered in the minutes." Bal. Code, § 5028; Code 1881, § 245.

In default cases the statutes provided in substance that,

in actions on contract for the recovery of money only, the court should enter judgment for the amount claimed; and where, after appearance, the defendant did not deny the plaintiff's claim, but set up a counterclaim amounting to less than the plaintiff's claim, the court was authorized to enter judgment for the excess of plaintiff's claim over the counterclaim. Where action was for unliquidated damages, and the defendant made default, a jury was required to assess damages. Bal. Code, § 5090; Code 1881, § 289. Upon agreed facts the court was authorized to determine the case and enter judgment without a jury. § 298, Code 1881.

It is readily seen that the laws in force at the time of the adoption of the constitution recognized two kinds of consent to the waiver of jury trials in civil actions, viz., express consent and implied consent; express consent where, after appearance of the defendant, a written stipulation was entered into and filed, or an oral stipulation was entered on the record; implied consent where a party defaulted, or where, after appearance in the action, he failed to appear at the trial, or did not deny the plaintiff's claim. It would appear therefore that the word "consent," as used in this provision of the constitution, was intended to be used so as to include both express and implied consent. The determination of the meaning of this clause is not without its difficulties, because, if we conclude that the constitution means *express* consent, we must read that word into the provision, and the result is that the legislature may not now enact a law providing for implied waiver of jury trials in civil actions; notwithstanding that prior to, and at the time of the adoption of the constitution, and ever since that time, it has been, and now is, the law and practice to consider such right waived where the defendant defaults, and where the defendant appears and does not deny

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the plaintiff's claim, and where defendant appears in the case and fails to appear at the trial, and where an agreed state of facts is made. If we conclude that the consent mentioned may be either express or implied, the result is that the clause, "where the consent of the parties interested is given thereto," is largely tautology.¹ We think it was not intended by the constitution that there should be any radical change in the established practice, but that the words "consent . . . given" were used in their broadest sense. The legislature therefore may define what act shall constitute consent given.

It is conceded by the relator that the legislature has authority to pass an act providing for a reasonable jury fee to be taxed as costs. This assent is not binding upon the court. However, the general rule is that the power of the legislature is complete to enact any reasonable law where such power is not restricted by express or implied limitation, and it has been held that reasonable conditions may be imposed upon the right of trial by jury. 17 Am. & Eng. Enc. Law, p. 1107 (2d ed.); *Garrison v. Hollins, supra*; *Venine v. Archibald*, 3 Colo. 163; *Dailey v. State*, 4 Ohio St. 57; *Adams v. Corrington*, 7 Minn. 456.

It was said in *Adams v. Corrington, supra*:

"And that a party who demands a trial by jury, should be required to advance a small jury fee, whether it is considered as a tax on litigation, or as a part of the expense which is necessarily incurred in his behalf, seems no more liable to a constitutional objection than is the requirement that the fees of the clerk, sheriff and other officers shall be paid in advance when demanded. If the clause in the constitution means that we shall be permitted to litigate literally 'without price', there is an end to all fees, from the issuing of the summons to the entry of satisfaction of the judgment."

If an act was passed imposing unreasonable conditions, or

such as would make it obvious that the act was passed for the purpose of violating the right of trial by jury, it would no doubt be declared void; but we find no unreasonable provision in this act, and therefore conclude that it is not repugnant to the constitution.

The writ is therefore denied.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4786. Decided December 17, 1903.]

THE STATE OF WASHINGTON, *on the Relation of Robert Morrell*, v. SUPERIOR COURT FOR STEVENS COUNTY,
*Respondent.*¹

CORPORATIONS—POWERS—CONSTRUCTION OF ARTICLES—WATER RIGHTS OF MINING COMPANY. Where the articles of a mining company provide for carrying on many kinds of business including the acquiring of "water rights" and other appliances, all of which seem to center around the main object of mining and smelting ores, the words "water rights" have reference to some mechanical application thereof, and do not indicate an intention to form a water company for the purpose of supplying cities with pure fresh water, or authorize the company to acquire property by the right of eminent domain.

EMINENT DOMAIN—NOT EXERCISED BY ALIENS—OBJECTION RAISED BY OWNER OF LAND. Where land is sought to be appropriated under the right of eminent domain, the objection that the plaintiff is an alien and so not entitled to hold land in this state may be raised by the owner of the land in defense of his title, without waiting for action on the part of the state through its special officers.

ALIENS — FOREIGN CORPORATIONS — OWNERSHIP OF LAND. Bal. Code, § 4291, granting to foreign corporations all the powers of domestic corporations can not be urged as giving them the power to hold lands in this state in view of the constitutional inhibition against such ownership.

¹Reported in 74 Pac. 686.

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SAME—RIGHT OF WAY FOR WATER FLUME. The constitutional inhibition against the ownership of lands by corporations, the majority of whose stock is held by aliens, applies to the acquisition of a right of way for a water flume under the condemnation laws of the state.

Certiorari to review a judgment of the superior court for Stevens county, Richardson, J., in favor of the Northport Smelting & Refining Company, entered July 13, 1903, upon a trial before the court and an assessment of damages by a jury, appropriating a right of way across the lands of the relator. Reversed.

Post, Avery & Higgins, and J. A. Kellogg, for relator.

Voorhees & Voorhees, and E. M. Heyburn, for respondent. To the point that a condemnation for a public use is for the benefit, and in trust for the use, of the state, and therefore not within the constitutional inhibition against ownership by aliens, counsel cited: *Amoskeag Mfg. Co. v. Worcester*, 60 N. H. 522; *Gilmer v. Lime Point*, 18 Cal. 252.

DUNBAR, J.—The Northport Smelting & Refining Company a foreign corporation, is operating a smelter in the city of Northport, Washington. It made application under its asserted right to eminent domain to condemn certain lands of the relator, defendant in that action, for the purpose of conducting water across the relator's land to its smelter. The amended petition alleged, in addition to the allegations in the first petition in relation to the necessities of the smelter, that the corporation was also furnishing water to the city of Northport. The defendant's answer admitted that said corporation "was furnishing incidentally to said town of Northport a comparatively insignificant portion of the water used from said Deep Creek," the source from which the water is sought to be taken.

The defendant demanded of the plaintiff that it furnish answers to certain interrogatories, among which was the following: "Please state which, if any, of the owners or holders of the stock of said corporation is an alien; and, if any of the stock of said corporation is owned or held for another person or corporation, please state whether the person or corporation for whom the same is held is an alien, and how much stock is so held." The plaintiff refused to answer these interrogatories, and the defendant, among other things, incorporated in its answer the allegation that the plaintiff did not have a right to condemn land or exercise the right of eminent domain, and that the capital stock of the plaintiff, and each and every share thereof, was owned by aliens, and that no part of the lands sought to be condemned contained valuable deposits of mineral, metals, iron, coal, or fire clay, nor was necessary for mills or machinery to be used in the development of lands of the above character, or for the manufacture of the products therefrom.

The defendant asked the court for judgment on the pleadings for the reason that the plaintiff refused to answer the interrogatories in relation to the stockholders being aliens. This motion was denied, and a demurrer was interposed to the affirmative matter in the answer in that regard, which was sustained by the court. A jury was called to assess the damages, judgment of condemnation was entered, and this writ of review has been sued out to question such judgment, and to review the errors of the court alleged to have been committed in the proceeding.

The articles of incorporation, which were exhibited in this case, are not sufficient, in our judgment, to constitute the plaintiff a water company within the meaning of § 4278, Bal. Code; which provides that "such water companies, incorporated for the purposes specified in the pre-

ceding section, shall have the right to purchase or take possession of, and use and hold, such lands and waters for the purposes of the company, lying without the limits of the city or town intended to be supplied with water, upon making compensation therefor." The preceding section referred to is as follows:

"The provisions of this charter shall extend to and apply to all associations already formed under any law of this state [or] hereafter to be formed under the provisions of this act for the purpose of supplying any cities or towns in this state or the inhabitants thereof with pure, fresh water."

The articles of incorporation are too long to set forth in this opinion, but a careful study of them convinces us that, while they provide for carrying on many kinds of business, the statement—that the purposes for which the corporation is formed are the acquiring, purchasing, leasing, owning, and operating of lands, mines, mining claims, water rights, smelters, reduction works, mills, machinery, electric, water and steam power plants, and all conduits and means of using and applying the same in any manner and at any place, and to do all and everything in connection with the acquiring, construction, owning, using, and enjoyment of smelter, mills, mines, water rights, power sources, power plants, and means and appliances used in connection therewith, the purchasing of and working ores, minerals, and metals by smelting, milling, or other process, and the carrying on of the general business of purchasing, treating, smelting, refining, or the reduction of ores by any process, either as owners of said ores or under contract for the treatment of the same or for hire—does not indicate an intention to form a water company for the purpose of supplying cities or towns, or the citizens thereof, with pure and fresh water; but that the words "water rights," like the other words used in the articles, have reference to some

mechanical application; and while this statement is amplified somewhat in succeeding sections, the amplifications, like the section quoted, center around and apply to the evident main object of the incorporation.

The question as to whether or not a corporation has a right to condemn land for the purpose of aiding in operating a smelter, on the theory that the operation of the smelter is for public use, has been decided adversely to the contention of the respondent in *Healy Lumber Co. v. Morris*, recently decided (ante, p. 490).

At the threshold of this case, however, there is a question the proper determination of which we think is fatal to respondent's contention. The court proceeded upon the theory that the defendant did not have the right to raise the constitutional question as to the ownership of lands by aliens. § 33 of art. 2 of the constitution provides, that the ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage, or in good faith in the ordinary course of justice in the collection of debts; and that all conveyances of lands hereafter made to any alien, directly or in trust for such alien, shall be void; with a proviso that the provisions of such sections shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay.

In this we think the court erred. It is true that, in the case of *Oregon Mortgage Co. v. Carstens*, 16 Wash. 165, 47 Pac. 421, 35 L. R. A. 841, it was decided in this state, by a divided court, that, where a mortgagor had deeded the lands to the alien mortgagee before foreclosure of suit, no one but the state could raise the question that the land was deeded to an alien in violation of the constitutional provision just above referred to. That portion of the de-

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cision, however, was only incidental and really unnecessary; for the court held that, in effect, the proceeding was the collection of a debt in the ordinary course of justice, and that the deed of land prior to the foreclosure of the mortgage was simply in the interest of saving the costs of foreclosure and the liability to a deficiency judgment upon the part of the mortgagor. This case was followed in *Goon Gan v. Richardson*, 16 Wash. 373, 47 Pac. 672, which was also a mortgage case, where the announcement was made, as in the other case, that it was not competent for the appellant to show that the mortgagee was incapable of taking title to real estate, because that could only be shown in a suit by the state.

But whatever may be said of the soundness of the doctrine there enunciated, those cases are easily distinguished from the case at bar, where the defendant is not questioning the right of the alien plaintiff to hold real estate, but is questioning its right to take real estate that belongs to the defendant; and, whatever questions of public policy might intervene to prevent alleged aliens from being annoyed at the instance of impertinent or spiteful citizens, such policy could not be applied to a citizen who is defending the title to and possession of his own land. The right of eminent domain is not a right belonging to individuals or corporations, but is only conferred by special enactment; and, before a plaintiff should be allowed to absorb the property of another by condemnation, it is not asking too much of him that he affirmatively show that he is authorized by the law to condemn land at all. It would certainly seem that a citizen has a right to protest against the taking away of his private rights by one without authorization, when such rights are imperiled, without awaiting the action of the state through its special officers. He is invoking the laws of the state in aid of his rights, and it can make no sub-

stantial difference whether the machinery of the law is put in operation by himself or by an agent of the government. To sustain this contention relator cites *Case v. Kelly*, 133 U. S. 21, 10 Sup. Ct. 216, 33 L. Ed. 513; *Zanesville v. Zanesville Gas-Light Co.* (Ohio), 23 N. E. 55; *New Orleans Gas-Light Co. v. Louisiana Light etc. Co.*, 11 Fed. 277; *Grand Rapids Bridge Co. v. Prange*, 35 Mich. 400, 24 Am. Rep. 585; *Salmon River M. & S. Co. v. Dunn* (Idaho), 3 Pac. 911; *South & N. A. R. Co. v. Highland Ave. etc. R. Co.*, 119 Ala. 105, 24 South. 114.

It is contended by the respondent that these cases do not apply, that they can be distinguished from the case in question, and that they are not cases in regard to the condemnation of land. An examination of these cases satisfies us that they each apply, with the exception of *Salmon River etc. Co. v. Dunn, supra*, and that, while but one of them has reference to condemnation cases, the principle applied by the courts would be equally appropriate in a condemnation case.

In *Case v. Kelly, supra*, the language of Justice MILLER is very appropriate when he says:

"We need not stop here to inquire whether this company can hold title to lands which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title, and to own such lands; and the question here is, not whether the court would deprive it of such lands, if they had been conveyed to it, but whether they will aid it to violate the law, and obtain a title which it has no power to hold. We think the questions are very different ones, and that, while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void, on the prin-

ciple that they had no authority to take such lands, it is very clear that it will not make itself the active agent, in behalf of the company, in violating the law, and enabling the company to do that which the law forbids."

In *Zanesville v. Zanesville Gas-Light Co.*, *supra*, where the right of the corporation was questioned by the defendant, the court said:

"It is open, at all times, to the person against whom a corporation may claim the right to exercise a power, to call the power in question, . . ."

In *New Orleans Gas-Light Co. v. Louisiana Light etc. Co.*, *supra*, where the question was whether the plaintiff corporation could legally exist under the laws, in an action brought by it, it was held that, where defendants are sued on rights depending upon the corporate capacity of the complainant, such corporate rights might be attacked as a means of defending the suit.

In *Grand Rapids Bridge Co. v. Prange*, *supra*, in an opinion written by Judge Cooley, C. J., it was held that, while the forfeiture of a corporate franchise could not collaterally be taken advantage of in a private action, yet one sued by a corporation could raise the question of the rights of the corporation, although he could not raise the question of the corporate existence of the corporation. It will be observed in this case that the defendant did not attack the corporate existence of the plaintiff, so far as this question was concerned, but it attacked the right of a corporation to condemn lands, a majority of whose stockholders were aliens. It does not assume to raise any question of defendant's capability to do business under its charter.

In *South & N. A. R. Co. v. Highland Avenue etc. R. Co.*, *supra*, the right of condemnation of a street railway company is discussed, and it is held that an interested individual may contest the claim of a corporation where it

seeks the aid of a court to perfect title to real property, distinguishing it from a case where a deed has been executed and delivered to the corporation. In the absence of authority, and on principles of common justice, we should hold that the defendant had a right to question the right of the condemning party to appropriate his land.

It is said, however, by the respondent, that under the provisions of § 4291, Bal. Code, any corporation incorporated under the laws of any state or territory in the United States, or in any foreign state or country, for any purpose for which a domestic corporation is authorized to be formed under the laws of this state, shall have power to do any and every act which a domestic corporation may do, on complying with the conditions prescribed under the statute, which conditions were complied with in the case at bar. But it certainly will not be contended that any statute could remove the constitutional inhibition providing that the ownership of lands by aliens is prohibited in this state and especially providing that every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition. So that a statutory argument is entirely without force.

It is also contended by the respondent that this is not such an ownership of land as is contemplated by the constitution, that the right of way sought to be condemned might be abandoned, and that the tenure of the corporation is uncertain. But it seems to us that, under the condemnation laws of the state, the substantial right to the land passes to the corporation; and, so far as duration is concerned, we held in *State ex rel. Winston v. Morrison*, 18 Wash. 664, 52 Pac. 228, that a lease for a term of ninety-nine years was void under the constitutional provision above referred to, and that it did not refer to absolute own-

ership; also, in *State ex rel. Winston v. Hudson Land Co.*, 19 Wash. 85, 52 Pac. 574, 40 L. R. A. 430, that, under the constitutional provision prohibiting alien ownership of lands, a lease of lands to an alien for the period of forty-nine years was void; and that the constitutional provision would not be construed away to such an extent that aliens could become owners of lands under any circumstances other than the circumstances incorporated in the proviso in the constitution itself.

The motion for judgment on the pleadings should have been granted, and the cause will be reversed, and remanded with instructions to the lower court to grant said motion as asked for. It will be time to adjudicate other propositions involved in the case when they are presented by a plaintiff showing the right to ask for such relief.

FULLETON, C. J., and MOUNT, HADLEY, and ANDERS, JJ., concur.

[No. 4822. Decided December 19, 1903.]

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PUGET SOUND PUBLISHING COMPANY, *Respondent*, v. THE
TIMES PRINTING COMPANY, *Appellant*, and CITY
OF SEATTLE, *Defendant*.¹

NEWSPAPER—WHAT IS—SUFFICIENCY OF EVIDENCE. The Daily Bulletin, a paper of four pages, each thirteen by twenty inches with five columns of regular printed matter, devoted to the dissemination of news upon a great variety of topics of interest to the general public and containing general advertisements, but giving special prominence to legal news, is a "newspaper" within § 31, Seattle city charter, relating to the selection of an official city paper, and within the usual acceptance of the term.

SAME—GENERAL CIRCULATION—NEED NOT BE UNIVERSAL. A paper having 750 to 1000 subscribers in the city of Seattle, daily

¹Reported in 74 Pac. 802.

distributed to them, and read by about 3000 persons, is a paper of "general circulation," since general means extensive and not universal.

DAILY PAPER—HOLIDAYS EXCEPTED. A paper published every day except Sundays and legal holidays is a daily paper.

MUNICIPAL CORPORATIONS—OFFICIAL PAPER—LETTING AWARD—CITY COUNCIL—DISCRETION—ABUSE. Under a city charter requiring the city printing to be awarded to the lowest bidder, the city council, although vested with some discretion in determining which is the lowest bid, cannot arbitrarily award the printing in plain disregard of the provisions, and the courts will restrain an award at 50 cents an inch where a qualified competitor has bid less than 16 cents per inch.

SAME—HIGHEST BIDDER—ACTION TO ENJOIN AWARD—EVIDENCE AS TO AVERAGE PRICE. In an action to restrain a city council from letting the public printing to the highest bidder, in violation of charter provisions, evidence as to the average price paid and as to the reasonableness of the defendant's bid is properly excluded as immaterial.

Appeal from a judgment of the superior court for King county, Tallman, J., entered May 19, 1903, upon the decision and findings of the court in favor of the plaintiff, granting a permanent injunction against the city council's award of the official printing of the city of Seattle. Affirmed.

Bausman & Kelleher, for appellant.

Geo. F. Aust (*C. A. Riddle*, of counsel), for respondent.

ANDERS, J.—Section 31 of the charter of the city of Seattle provides that:

"A daily newspaper of general circulation and published in the city, to be styled 'City Official Newspaper,' shall be designated in the following manner: The city clerk shall, on the first Monday in November in each year, cause to be published for ten consecutive days, excluding Sundays, in some paper of general circulation in the city, a call to the owners and managers of newspapers for sealed proposals to do the city printing for the then ensuing next

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fiscal year, each of which proposals shall be accompanied by bond with not less than two sureties, in the sum of five thousand dollars, approved by the comptroller and corporation counsel, conditioned that if the proposal be accepted the party proposing will, during the period mentioned in his proposal, well, seasonably, and faithfully cause to be accurately printed and published, according to law, in a certain daily newspaper (naming it) of general circulation in the city and published therein, all and singular the matters and things required by law to be published in the city official newspaper of the city of Seattle. . . . and thereupon the council shall, by resolution, announce the names of all parties whose proposals have been offered, and the terms of their proposals respectively, and designate as city official newspaper that newspaper whose manager or owner has offered the lowest proposals, with duly approved bond, and such newspaper shall, at the beginning of the next ensuing fiscal year, and during said year, be such city official newspaper;”

Pursuant to this provision of the city charter, the city clerk duly issued and published a call to the owners and managers of newspapers, published in the city of Seattle, for bids for the city printing for the year 1903. In response to such call, the respondent, a taxpayer of the city of Seattle, and the owner and publisher of The Daily Bulletin, duly submitted its bid, accompanied by its bond in the sum required by the city charter, in which it offered to do the city printing for the specified time at the rate and for the price of sixteen cents per inch for each first insertion and ten cents an inch for each subsequent insertion.

Among the bidders was The Times Printing Company, the owner and publisher of The Seattle Daily Times. That company proposed to do the city printing in The Times at the rate of fifty cents an inch. The city council, notwithstanding this disparity in the bids, designated The Seattle Daily Times as the official newspaper of the city of

Seattle for the year 1903, and awarded the city printing for the year 1903 to the defendant, The Times Printing Company. The respondent thereupon instituted this action against the defendants to obtain an injunction restraining the city and its council from further proceedings under said award, and from recognizing the bid of The Times Printing Company, and compelling them to award the printing to the plaintiff. A temporary injunction was issued, which was, upon the final hearing, made permanent. The defendant The Times Printing Company has appealed.

It is claimed by the learned counsel for the appellant that The Daily Bulletin is not a newspaper of general circulation in the city of Seattle, within the meaning of § 31 (above quoted) of the city charter, and that the court erred in holding the contrary. The court found, among other things, that The Daily Bulletin, printed, owned, and managed by the plaintiff, is a daily newspaper, published in the city of Seattle every day except legal holidays, and has been so published for more than eight years; that it is a four-page paper, each page having five columns of regular printed matter; that the pages are each thirteen inches by twenty inches; that it is devoted to the dissemination of news on a great variety of topics of interest to the general reader, but gives special prominence to the dissemination of legal news, including proceedings in the supreme court of the state, and of the federal, state, and city courts sitting at the city of Seattle; that it gives a complete report, both of the pleadings filed in cases pending, and also of cases tried, and the result of such trials, and all new suits filed; that it publishes the proceedings of the board of public works of the city of Seattle, showing the board's action in all matters relating to street and other improvements and assessments against real estate on account thereof, and all matters of interest in relation to real estate; that it regularly pub-

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lishes a complete report of the doings of the city council of Seattle; that it gives a daily record of the deeds, mortgages, mechanics and other liens, and all other instruments, filed in the office of the auditor of King county, and sales of real estate by the sheriff under judicial process; that in every issue it contains general news of the day of interest to newspaper readers generally; it published daily the weather report, the Seattle bank clearances, theatrical news, the monthly statement of the Puget Sound customs, the building statistics of Seattle, and the notices to all property holders whose possessions are affected by the board of public works; also the most prominent building news of the entire northwest; that it contains varied advertising matter, advertising more than one hundred different classes of business, trades, and professions, confined to no one calling or trade, but such as is to be found in newspapers of general circulation; that it contains a complete report of the doings of the Seattle Chamber of Commerce and of the Seattle Manufacturers' Association.

The court in its findings specifically designated the institutions, trades, business, kind of property, etc., regularly advertised in The Bulletin, which we need not particularly enumerate. The court further found, that The Bulletin circulates among all classes of people in the city of Seattle; that it has between 750 and 1000 subscribers in the city of Seattle, and is daily delivered to such subscribers, with the exception of legal holidays, and is daily read in the city of Seattle by about 3000 persons; that it daily contains a resume of the world's telegraphic news, briefly stated; that it contains an editorial column devoted to the discussion of events and topics of interest to the general public; that it has been, by order of the superior court of King county, frequently designated as, and declared to be, a newspaper of general circulation; that for more than three years no-

tices of all classes, required by law to be published in a newspaper of general circulation, have been published regularly in The Bulletin; among which appear summons for publication, foreclosure notices, all manner of probate notices required by law to be published, notices of foreclosure of delinquent tax certificates, and all other such notices as are usually found in a newspaper of general circulation; and that in each instance an order of the superior court of King county has declared The Daily Bulletin to be a newspaper of general circulation in King county. The testimony introduced at the trial, and the copies of the paper sent up as exhibits, seem to support the findings of the court as to the character of The Daily Bulletin.

It is asserted by the learned counsel for the appellant that words in a statute or charter are presumed to be used in their ordinary and popular signification, unless there is particular reason for assuming they are not, and that, in the ordinary acceptation of that term, The Bulletin cannot be said to be a newspaper. Assuming that the rule of law as stated by counsel is correct, and that the framers of the city charter used the word newspaper according to its usual acceptation, the question remains, what is its usually accepted meaning? Counsel for appellant answers this question by quoting the following definition from The Century Dictionary:

"NEWSPAPER.—A paper containing news; a sheet containing intelligence or reports of passing events, issued at short but regular intervals, and either sold or distributed gratis. . . ."

"Newspapers may be classed as *general*, devoted to the dissemination of intelligence on a great variety of topics, which are of interest to the general reader, or *special*, in which some particular subject, as religion, temperance, literature, law, etc., has prominence, general news occupying only a secondary place."

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This definition is substantially the same as that given by the courts of various states. A late law writer defines a newspaper as follows:

"A newspaper, in the popular acceptance of the word, is a publication issued at regular stated intervals, containing, among other things, the current news, or the news of the day." 21 Am. & Eng. Enc. Law, p. 533 (2d ed.).

According to the above definition, it can hardly be doubted that the publication in question is a "newspaper," in contemplation of the charter of the city of Seattle. Indeed, we have found no case in which a publication containing intelligence on as many topics of interest to the public as The Bulletin regularly contains has been held not to be a newspaper. In the recent case of *Hall v. Milwaukee*, 115 Wis. 479, 91 N. W. 998, in which practically all the authorities upon this question are collected, the supreme court of Wisconsin held that a daily eight-page paper, twelve by eighteen inches, with a bona fide morning circulation of 375 copies and an evening circulation of 578 copies, 368 of which were paid by commission men—being a law and business reporter, with reports of the daily markets, containing also items and news of general interest to the public, general advertisements, and "plate matter" in varying quantities, sometimes more than a column containing general matter—was a "newspaper" within the meaning of the charter of Milwaukee requiring the city council to let the publication of city ordinances, etc., to the newspaper offering to make the publication at the lowest price for the year. That is a well considered case, and the doctrine therein announced is supported by the overwhelming weight of authority. It is in point here by reason of the similarity of the publication there considered to that in question in the case at bar. After citing all of the cases cited by appellant, and many others, that court observed: "The only decisions

tending to exclude special or class journals from designation of newspapers, for purposes of statutory publication, are *Beecher v. Stephens*, 25 Minn. 146; *In re Charter Application*, 11 Phila. 200; *Crowell v. Parker*, 22 R. I. 51, 46 Atl. 35 [84 Am. St. 815]"—all cited by appellant. And the court, in its review of the three cases last above cited, clearly shows that they do not really impugn its conclusion in the case before it.

It is next claimed that, even if this publication is, in contemplation of law, a newspaper, it is not a newspaper of general circulation in the city of Seattle, and for that reason does not meet the requirements of the city charter. If it were true that the word "general" is equivalent to "universal," there would certainly be much force in this contention. But these words are not synonymous. The word general is derived from "*genus*," and technically relates to a whole genus or kind, or to a whole class or order. But its more usual meaning is, common to many; widely spread; prevalent; extensive, though not universal; as, a *general* opinion; a *general* custom. Webster's International Dictionary.

In *Blair v. Howell*, 68 Iowa, at page 621, 28 N. W. 200, the supreme court of Iowa considered and determined the meaning of the word "general" as used in a statute of that state. In the course of its opinion the court said:

"The only difficulty, if there is any, arises upon the question as to whether Bowen's recognition of the children was general and notorious, within the meaning of the statute. . . . It is proven that Bowen sometimes denied that the plaintiffs were his children. In such denial he certainly did not recognize them. It is claimed, therefore, that his recognition was not general, but, at most, was limited and partial. But everything is limited and partial which is not universal, and 'general' is not equivalent to 'universal.'"

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Webster says that the word "general" means "extensive, though not universal." In *Linn v. Allen* (Ind.), 44 N. E. 646, 33 L. R. A. 779, 57 Am. St. 223, the question whether "The Daily Reporter," printed and published in the city of Indianapolis, having a circulation in the city of Indianapolis of about 550 copies, and of about 2500 copies outside the city throughout the state, and published daily, except Sunday, was a "newspaper of general circulation," within the meaning of the statute providing for the service of process by publication, was directly before the supreme court of Indiana; and the court held that it was such a paper, although it was primarily devoted to the general dissemination of legal news, but contained other matter of general interest to the public. In discussing this question the court observed:

"By a 'newspaper of general circulation' the legislature certainly did not intend a newspaper read by all the people of the county. As a matter of fact, every newspaper is in greater or less degree devoted to some special interest. No one, however, would claim that because a newspaper should, for example, be the organ of a certain political party, and especially devoted to the interests of such party, it would not, therefore, be a newspaper of general circulation. Yet such a newspaper is, to a large extent, read only by the members of the political party whose doctrines are advocated and expounded in its columns. There is no doubt that where a publication is devoted purely to a special purpose, it would be an unfit medium to reach the general public. A medical, literary, scientific, or legal journal is professedly but for one class, and that class but a comparatively small part of the whole population; and it would be manifestly unjust, as well as against the letter and spirit of the statute, to use such a journal for the publication of a notice affecting the property or personal rights of citizens in general. The newspaper before us, however, is no such professional or class journal. While it is a law publication in a certain sense, and of particular interest to the legal profession, yet its character, as shown by the evidence,

makes it of general interest to the community at large, especially to that part of the community likely to be concerned with matters in courts and other public business."

See also: *Kerr v. Hitt*, 75 Ill. 51; *Hall v. King*, 38 Minn. 349, 37 N. W. 792; *Lynch v. Durfee*, 101 Mich. 171, 59 N. W. 409, 24 L. R. A. 793, 45 Am. St. 404; *Kingman v. Waugh*, 139 Mo. 360, 40 S. W. 884. In view of the facts disclosed by the record in this case, and the decisions of other courts, we are clearly of the opinion that The Daily Bulletin is, as the court below found, a newspaper of general circulation in the city of Seattle.

It is suggested, however, that it is not in fact a daily newspaper because it is not published either on Sundays or legal holidays, but we do not think the point is well taken. It was held by the supreme court of California, in *Richardson v. Tobain*, 45 Cal. 30, that a newspaper which was published every day of the week except Monday was a daily newspaper in the sense of the statute requiring certain notices to be published in a "daily newspaper." In its discussion of the question the court said:

"The term was used, and is to be understood, in its usual popular sense; and in this sense it is clear that a paper which, according to its usual custom, is published every day of the week except one, is a daily paper. Otherwise a paper which is published every day except Sunday would not be a daily paper. The term, in its popular sense, does not admit of this construction."

The same rule was announced by the supreme court of Minnesota, in *Tribune Publishing Co. v. Duluth*, 38 Minn. 27, 47 N. W. 309, wherein it was held that a newspaper published six consecutive days in each week was a daily newspaper, within the intent and meaning of the law. We are constrained to hold that The Daily Bulletin is a daily newspaper according to the common acceptation of that term. As we have said, it is a newspaper; and, as it is not

within either of the classes of newspapers known as monthly, weekly, or semi-weekly, it must be classed as a daily paper, notwithstanding the fact that it is not published every day of every week.

We come now to the consideration of the appellant's next contention, namely, that it was for the council alone, and not the court, to determine which of the several bids was the lowest. In support of this proposition appellant cites and relies on *Times Publishing Co. v. Everett*, 9 Wash. 518, 37 Pac. 695, 43 Am. St. 865. It appears in that case that the city of Everett called for bids for the city printing and advertising; that two bids were submitted, one by The Times Company, and the other by one Bradley. The council awarded the contract to Bradley by resolution, declaring him to be the "lowest and best bidder therefor," although his bid was, according to its terms, higher than that of his competitor. The law provided that such contracts should be let to the lowest bidder. The publishing company brought suit in the superior court to enjoin the performance of the contract, and to require the city to enter into a contract with the plaintiff as the lowest bidder for the printing and advertising. The trial court sustained a demurrer to the complaint, and dismissed the action. On appeal the judgment was reversed by this court. An examination of that case will disclose the fact that it was not there held that the discretion vested in a city (or its council), in cases of this character, is not subject to review by the appellate court. In that case this court conceded that, even under the strict language of the statute requiring the contract for advertising to be let to the lowest bidder, there was some discretion left to the council. But, in order that its meaning might not be misunderstood, it carefully designated the matter and things which were left to the discretion of the council. The following language, appearing in

the opinion of the court, must not be disregarded in considering that case:

"We have this case upon the complaint alone, and, under its allegations, the conclusion cannot be escaped that there was, on the part of the council, a gross disregard of the interests committed to it in making its award. It found nothing but that the bid of Bradley was the lowest and best, but the complaint shows affirmatively that the appellant was, in every respect, qualified and competent, and was equally entitled to consideration with its competitor. Yet, with the bidders standing on an equal footing, the contract was awarded to that one whose bid was almost four times that of his rival, without any apparent excuse or reason but the arbitrary will of the council."

So in this case, we see no reason or excuse for awarding the contract to the appellant "but the arbitrary will of the council." It would be extremely unfortunate for the inhabitants of our cities if the respective city councils should be permitted, under the guise of "judicial discretion," or otherwise, arbitrarily and unreasonably to disregard the plain provisions of statutes or charters. This court has not heretofore sanctioned any such proceeding, and is not inclined to do so in this instance.

It is further insisted that the court erred in refusing to permit appellant to prove the average price paid in Seattle for printing notices and advertisements such as those in question, and also in refusing to allow appellant to prove that its bid was a reasonable one. We do not think the court erred in either of those rulings. The matters so sought to be proved were not material to the issues to be tried and determined, and the proffered testimony was, therefore, rightly excluded.

We find no error in the record, and the judgment is therefore affirmed.

FULLERTON, C. J., and DUNBAR, HADLEY, and MOUNT, JJ., concur.

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Statement of Case.

[No. 4415. Decided December 19, 1903.]

JOHN E. HUMPHRIES, *Respondent*, v. RASMUS SORENSON
et al., *Appellants*.¹

33	563
34	322
33	563
39	622

JUDGMENT—ENTRY—FINDINGS OF FACT—CONSENT TO FORM—EXCEPTIONS. The endorsement upon the findings and judgment entry of "O. K." signed by the attorney for the defeated party will be considered as an assent only to the form, where such intent is shown by the taking of exceptions at the time the decision was rendered and after the entry of the judgment.

APPEAL—REVIEW—EXCEPTIONS TO FINDINGS—SUFFICIENCY. Written exceptions to findings of fact taken in the form of assignments of error are sufficient to warrant a review of the evidence on appeal.

EXECUTIONS—TRANSCRIPT OF JUDGMENT FROM ANOTHER COUNTY—HOW ISSUED—SALE. An execution cannot be issued by the superior court of one county upon a transcript of a judgment entered in another county, although Bal. Code, § 5132, creates a lien therefor upon the debtor's real estate in the county where filed; and a sale on such an execution is void.

EJECTMENT—TITLE OF PLAINTIFF—WEAKNESS OF DEFENDANT'S TITLE. In an action to recover the possession of real property, the plaintiff cannot recover upon the weakness of defendant's title, and if without title himself the action fails.

COMMUNITY PROPERTY—MORTGAGE BY WIFE ALONE—FORECLOSURE—DEFENSE TO EJECTMENT—AFFIRMATIVE RELIEF NOT GRANTED WHEN. The foreclosure of a mortgage of community property, made by the wife alone, conveys no title, and affirmative relief, quieting the title thereunder, cannot be given to defendants relying thereon in an action to recover possession, upon dismissing the action for failure of plaintiff's title.

Appeal from a judgment of the superior court for Spokane county, Prather, J., entered March 29, 1902, upon findings made by the court in favor of defendants after discharging the jury, dismissing an action to recover the possession of real estate and to quiet title. Reversed.

¹Reported in 74 Pac. 690.

L. L. Westfall, for appellants. The husband, Moses Loree, having executed the mortgage as attorney in fact for his wife upon her separate property, and having represented it to be such, is estopped and bound by the mortgage and subsequent proceedings. *Yesler v. Hochstettler*, 4 Wash. 349, 30 Pac. 398; *Calhoun v. Leary*, 6 Wash. 17, 32 Pac. 1070; *Sackman v. Thomas*, 24 Wash. 660, 64 Pac. 819; *Cardinal v. Hadley*, 158 Mass. 352, 33 N. E. 575, 35 Am. St. 492; *Canadian etc. T. Co. v. Bloomer*, 14 Wash. 491, 45 Pac. 34; *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030; *Konnerup v. Frandsen*, 8 Wash. 551, 36 Pac. 493; *Nuhn v. Miller*, 5 Wash. 405, 31 Pac. 1031, 34 Pac. 152; 34 Am. St. 868; *Webster v. Thorndyke*, 11 Wash. 390, 39 Pac. 677.

Danson & Huneke and *E. P. Edsen*, for respondent. To the point that the judgment was entered by consent by reason of the endorsement "O. K", counsel cited: *Indianapolis etc. R. Co. v. Sands*, 133 Ind. 433, 32 N. E. 722; *Citizen's Bank etc. v. Farwell*, 56 Fed. 570; *Bennett v. Marion*, 101 Iowa 112, 70 N. W. 105; *Davis Paint etc. Co. v. Metzger etc. Co.*, 90 Ill. App. 117.

PER CURIAM.—This action was begun in the superior court of Spokane County by respondent John E. Humphries against appellants Rasmus Sorenson, Anna M. Sorenson, his wife, Milton Showalter, and Abbie Showalter, his wife. The respondent in his complaint alleges, that he is the owner in fee simple of certain lands, in the above county; that in the month of December, 1896, appellants Rasmus and Anna M. Sorenson wrongfully and unlawfully entered into the possession of such real property, and have, ever since that time, either by themselves or by appellants Milton Showalter and Abbie Showalter, been in the possession thereof; that the Showalters are in the exclusive

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possession of such property, claiming to hold the same under a contract of purchase with the Sorensens. Respondent demanded judgment for possession, damages for wrongful detention, that his title in such lands be quieted as against all claims of appellants therein, that he recover costs, and have all other and further relief.

Appellants, by their amended answer, deny respondent's ownership and right of possession to the premises in question, the wrongful entry and withholding, and the claim for damages; and admit the possession of the Showalters under a contract of purchase with the Sorensens. It was further alleged in this answer, that on the 19th day of August, 1892, Catherine L. Loree, then being the owner in fee of said lands, mortgaged the same to J. M. Grinstead; that on the 10th day of October, 1892, she conveyed the land in question to D. J. Lee; that such mortgage was afterwards foreclosed in a certain action instituted in the superior court of Spokane county wherein J. M. Grinstead was plaintiff and Catherine Loree, Moses Loree, and D. J. Lee were defendants; that on the 29th day of December, 1896, appellant Rasmus Sorenson purchased said property at the sheriff's sale on such foreclosure proceedings; that such sale was afterwards confirmed, and a deed executed to purchaser (Sorenson) on December 30, 1897, and filed for record in the auditor's office of the above county at that date; that he entered into possession under such sale and deed; alleging title in fee by virtue of such proceedings and deed. Appellants prayed that respondent take nothing by this action, that appellant Rasmus Sorenson's title in this real estate be quieted, with costs taxed against respondent.

Respondent, by his reply, denies the material allegations of new matter alleged in the above answer, and alleges, that at all the times mentioned therein Moses and Catherine

Loree were husband and wife; that the mortgage given to Grinstead, and the note therein mentioned, were signed in the name of Catherine Loree by Moses Loree without authority; that no payments were made upon said note; and that more than six years have elapsed since the maturity thereof. The cause came on for trial before the court and a jury. At the conclusion of the testimony, respondent moved for a directed verdict in his favor. Thereupon the trial court discharged the jury, and requested respondent's counsel to "prepare the findings and judgment." Mr. Westfall, appellants' counsel, then stated in open court: "And we can have an exception to each, any, and every finding." Findings of fact and conclusions of law, with form of judgment, were prepared and served on appellants' counsel March 28th, 1902. In the transcript, below the findings and conclusions and judgment entry, the following words and figures appear: "O. K. Westfall. Filed March 29, 1902, at 10 o'clock A. M. E. K. Erwin, Clerk, C. B. Syphert, Deputy." The findings, conclusions, and judgment entry in favor of respondent were signed by the trial court at that date, March 29, 1902. On the second day of April, following, the appellants served and filed their exceptions to certain findings and conclusions of law above noted, alleging their exceptions in the form of assignments of error. Defendants appeal from the judgment entered.

The respondent contends, that the record shows consent on the part of appellants to the findings, conclusions, and the judgment as rendered; that, therefore, appellants ought not to be heard on the merits of the controversy at the bar of this court; that "The abbreviation 'O. K.' has received a universal and well defined meaning, and is recognized by modern lexicographers . . . It means 'Right', 'Correct'"; that, as used, this abbreviation does not apply to

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the acceptance of service, which "appears in the other indorsement."

We do not question the general rule of law that, where a judgment is entered by a court of competent jurisdiction on stipulation of the parties, in the absence of fraud or mistake, it will not be reviewed in the appellate court. The first authority cited by respondent's counsel in support of his contention is *Indianapolis, D. & W. Ry. Co. v. Sands* (Ind.), 32 N. E. 722. In the opinion of the court, we find the following language: "The record shows that on the 23d day of June, 1891—the day named in the agreement for the rendition of the judgment—the agreement and the decree were entered of record; and it nowhere appears that the decree as entered was other than the one agreed to, or that it was in any way modified by the court." It further appeared, that "The Farmers' Loan & Trust Company and Butler, trustees," parties to the litigation, did not sign the stipulation; that it was attached to the decree submitted to the counsel for the company and trustee; that said counsel endorsed on the decree, "O. K. Winter & Elam." The court said: "The abbreviation 'O. K.' has a well-defined meaning, 'All right,' 'Correct.' 4 Century Dict. p. 4098. The connection in which it was used must be taken into consideration." It was held that, in view of the facts appearing in the record, the decree was entered by consent and therefore not appealable.

We have examined the other authorities, to which respondent's counsel have referred us on this proposition. We find, that the abbreviation "O. K." must be construed in connection with facts of the particular case, or issues decided; that the significance of these characters must be interpreted in the light of the facts as they appear in the record, with the sole object in view of ascertaining the intention of the party or parties using them. From the

facts which appear in the record in the case at bar above noted, we think that appellants' counsel had no intention of waiving any of the rights of his clients in using that abbreviation, but that his assent went simply to the form of the findings, conclusions, and judgment of the trial court, and no further. We are, therefore, impelled to the conclusion that respondent's contention to the contrary is untenable. While the exceptions of appellants are presented in a form somewhat unusual in such cases, we are of the opinion that they are sufficient in substance to warrant us in considering this case on the merits.

The common source of title to the land in controversy was in Moses Loree and Catherine Loree, husband and wife. The appellants, however, contend that this real estate never belonged to the husband, but was the separate property of the wife (Catherine Loree), which contention will be considered later on. From the testimony adduced in the trial court on behalf of respondent, it appears, that on the 14th day of April, 1892, Sabin Abbott and wife, by warranty deed, conveyed the premises in question for the consideration of \$2,500, expressed in the deed to Catherine Loree; that, at the time, Moses and Catherine Loree were husband and wife, residents of the state of Washington; that on September 4, 1894, Chas. H. McGrew recovered judgment for \$397.65 and costs against Moses and Catherine Loree, in the superior court for Walla Walla county; that on April 5, 1895, a transcript of this judgment was filed and docketed in the clerk's office of the superior court for Spokane county; that on March 17, 1896, the judgment was assigned to Lillie Sanger; that on June 9, 1896, execution issued out of the latter court on such transcript; that on July 11, 1896, in pursuance of such execution, the sheriff of Spokane county sold the land in question to Lillie

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Sanger, and such sale was confirmed by the superior court of Spokane county on September 21, 1896; that, pursuant to such proceedings, on January 8, 1901, the sheriff of that county executed a deed of said premises to respondent J. E. Humphries, assignee of Lillie Sanger. Respondent bases his right to recover in the action at bar by virtue of such deed founded on these prior proceedings.

The mortgage set up in their amended answer was foreclosed upon these premises on the theory that Catherine Loree was the sole owner thereof. On appellants' behalf the evidence showed, that the mortgage was executed by Catherine Loree, *per* Moses Loree, under a power of attorney theretofore given by the wife to the husband; that Catherine Loree executed a conveyance of the premises to D. J. Lee, as alleged in said answer; and that the mortgage was foreclosed, sale had and confirmed, and the sheriff's deed of the premises executed to Rasmus Sorenson; and that possession thereof was taken by appellants in pursuance of these proceedings prior to the commencement of the present action. The evidence also showed that, when the mortgage was executed to Grinstead by Catherine Loree, and the deed of the latter made to Lee, the real estate in question was the community property of Moses and Catherine Loree; and the trial court so found. The court also found as a conclusion of law: "That the judgment of plaintiff (respondent) against said Moses Loree and Catherine L. Loree was a valid lien upon said land, and that the execution issued thereon was duly and regularly issued, and the proceedings thereunder down to and including the issuance of sheriff's deed to the plaintiff, were duly, regularly, properly had and made." Appellants excepted to this conclusion of law, and allege error.

Upon the correctness of this ruling depends the right of respondent's recovery in the case at bar. In *Murray v.*

Briggs, 29 Wash. 245, 69 Pac. 765, this court held, that in the absence of statutory authority, an execution cannot legally issue on a mere transcript of a judgment filed in one county, showing the original judgment to have been rendered in another county, although the filing of such transcript by virtue of Bal. Code, § 5132, creates a lien upon the debtor's real estate in the county where filed; that execution sales based upon such transcripts are void. Therefore we conclude that respondent's right to recover in the case at bar, being founded upon the sheriff's deed to him, in pursuance of the sale of the property in question, on execution issuing out of the superior court of Spokane county on the transcript of the judgment rendered in Walla Walla county, must fail; that such sale and proceedings were void; that the learned trial court erred in holding that such execution was duly and regularly issued, and that the proceedings had in pursuance thereof, down to and including the issuance of the sheriff's deed to respondent, were regular and valid.

If this is the proper construction to be placed on these proceedings and this deed—and we so hold—the respondent is not entitled to recover in this action, for want of title in himself. It is immaterial whether appellants have shown title in themselves or not. The respondent must recover, if at all, on the strength of his own title, and not on the weakness of that of appellant. *Hughes v. South Bay School District, No. 11*, 32 Wash. 678, 73 Pac. 778. The execution issuing out of the superior court in Spokane county, and all proceedings had under the writ, were null and void. It is an axiom of law as well as in physical science that, "Life cannot be breathed into a dead thing."

The appellants pray in their amended answer, on which they take the burden of proof, under their affirmative defense, that the title in fee simple in this land be quieted

in appellant Rasmus Sorenson. They allege that, at the times when the mortgage to Grinstead and the deed to Lee were executed by Catherine Loree, she was the owner in fee of this real estate; and appellants attempt to establish title in themselves by virtue of the proceedings alleged in such answer as to the foreclosure of that mortgage, and sale and sheriff's deed thereunder to appellant Rasmus Sorenson. We are of the opinion, that the record fails to sustain the issues tendered by appellants under such defense; that, under the testimony adduced at the hearing in the superior court, this real estate was, at the times above noted, the community property of Moses and Catherine Loree, and not the separate property of the wife (Catherine Loree); that the trial court committed no error in so finding, and in adjudging such instruments and proceedings invalid; and therefore we cannot grant appellants the affirmative relief for which they pray.

The respondent, however, cannot recover because of his failure to show title to this land, or right to the possession thereof, in himself at the commencement of this action.

The judgment of the superior court should be reversed, and the cause remanded with directions to dismiss the action at respondent's costs, and it is so ordered.

[No. 4674. Decided December 19, 1903.]

THE STATE OF WASHINGTON, *on the Relation of A. Willars, Respondent*, v. J. W. McCONNAUGHEY, *as Treasurer of King County, et al., Appellants.*¹

PUBLIC LANDS—COUNTY PROPERTY—SALE BY COUNTY COMMISSIONERS—NOTICE—ERRONEOUS DESCRIPTION. Bal. Code, § 306, providing that notice of sale of county lands by order of the county commissioners shall particularly describe the property, must be

¹Reported in 74 Pac. 678.

strictly complied with, and when the body of the notice designates the wrong block the sale is invalid, although the caption of the notice correctly states the block, since the caption is no part of the notice, and it is impossible to say that no one was misled by the error.

SAME—ERROR IN DESCRIPTION—ATTEMPT OF OFFICERS TO CORRECT AT TIME OF SALE. In such a case the sale can not be rendered valid by any act of the officers at the time of making the sale, or by an agreement with the purchaser that the notice was erroneous and that a different tract was intended and sold.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 9, 1903, upon a decision and findings of the court in favor of the relator awarding a peremptory writ of mandamus compelling county officials to execute a deed. Reversed.

F. S. Griffiths, for appellants.

Peters & Powell, for respondent.

PER CURIAM.—On the 27th day of December, 1902, the state of Washington, on relation of A. Willars, filed a petition in the superior court of King county for a writ of mandate against J. W. McConnaughey as treasurer, and George B. Lamping as auditor, of King county, requiring them in their official capacity to execute to petitioner a deed of lots 20, 21, and 35 in block 7 in King County Addition to the city of Seattle. Such proceedings were thereafter had that this matter came on for hearing before the superior court on the 25th day of February, 1903, findings of fact and conclusions of law were made, and judgment entered awarding a peremptory writ of mandamus as prayed for in the petition; from which judgment, the treasurer and auditor of King county appeal to this court.

It appears from the findings, that on November 5, 1902, and for some time prior thereto, King county was the owner of the above lots; that, at that date, the board of commis-

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sioners of such county, in regular session, determined that it was for the best interests of the county, and of all persons interested, to sell the above described lands with others, at a minimum value of \$75.00 per lot; and directed the sheriff to make such sale, and the county auditor to give notice thereof, in the manner provided by law, fixing the value of each lot offered for sale at a minimum price of \$75.00.

The court made the following findings of fact:

“(6) That in the resolution of the county commissioners for the sale of said premises, and in authority of the sheriff through the county auditor to carry into effect said resolution, and each and all of the prior proceedings, the property was described as lots twenty (20), twenty-one (21) and thirty-five (35) of block seven (7) of King County Addition, in King county, state of Washington, but the notice of sale as posted and published by the sheriff was in the following words and figures, to-wit:

‘Notice of Sale of County Property.

‘Lots 17 to 21 inc. & 32 to 35 inc. block 7 of the King County Addition.

‘It appearing to the board that on the 2nd day of October, 1902, application was made to the board of county commissioners of King county for the purchase of lots 17 to 21, inc., and 32 to 35 inc. of block 5, of King County Addition, and that by order and advertisement as required by law, Nov. 5, 1902, at the hour of 2 o'clock p. m. was set for hearing to determine the advisability of selling said property, and on said day set for the hearing thereof, the board met, and being fully advised in the premises, deemed it to the best interest of the county of King that said property be sold; It is therefore ordered that the sheriff of King county be directed to sell the said property at the front door of the King county court house, at not less than the appraisal thereof—\$75 per lot—said sale to be made on the 10th day of December, 1902, at the hour of 2 o'clock p. m. and that due return of said sale be made to this office. The county treasurer is hereby directed to appear

at said sale and to receive all moneys paid in thereat, issuing to the successful bidder at said sale a deed for said lots setting forth all the proceedings had thereunder, said deed to be attested by the county auditor under his official seal.

'Dated this 5th day of Nov. 1902.

'The board of county commissioners of King Co.

'By Geo. B. Lamping, clerk of the board.'

"That in truth and in fact, while there was in the addition of King county a block No. five (5), there were only eleven (11) lots in said block, numbered from one to eleven consecutively; that on the sale of said property on the 10th day of December, 1902, the property actually offered for sale, and the property bid in by the petitioners, was lots twenty (20), twenty-one (21) and thirty-five (35) of block seven (7) of King County Addition, and it does not appear that any one was misled by the discrepancy in said notice as posted and published by the sheriff, or that any one has been prejudiced thereby.

"(7) That when said land was offered for sale under the advertisement set out in finding six, the said sheriff then and there offered for sale on the 10th day of December, 1902, the lots described as lots seventeen (17) to twenty-one (21) and thirty-two (32) to thirty-five (35), inclusive, of block five (5) of King County Addition. That relator herein thereupon called the sheriff's and deputy treasurer's attention to the fact that the description of said property, as set forth in the body of said advertisement, was wrong in that it referred to block five (5), when in the heading of said advertisement it was set forth that the block was block seven (7). That thereupon, it was agreed between the sheriff, deputy treasurer and relator that block seven (7) was intended instead of block five (5), and thereupon the sheriff, with the consent and under the direction of the treasurer, exposed for sale lots seventeen (17) to twenty-one (21) and thirty-two (32) to thirty-five (35) inclusive, of block seven (7) of King County Addition, of which the relator purchased lots twenty (20), twenty-one (21) and thirty-five (35) in block seven (7).

"(8) That demand has been made by the petitioner upon

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the defendant treasurer and upon the auditor to execute and deliver to this petitioner a deed of said land, but this, both of them have refused to do."

Thereupon, the court made conclusions of law in conformity with the findings, granting the relief prayed for in the petition. The only question presented on this appeal is whether the above notice was a sufficient compliance with the statute in the matter of the description of the property ordered to be sold by the county board.

The proceedings were had under Bal. Code, ch. 3, §§ 305-311. § 305 authorizes and empowers the board of county commissioners to sell and convey county property, "under the limitations and restrictions, and in the manner, hereinafter provided." § 306 provides for the giving of notice of the intention to sell. "Such notice so published shall particularly designate and describe the property or portion thereof which it is proposed to sell." § 307 makes provision relating to the findings and records of the board of commissioners. § 308 relates to the effect of the decision of the board, and provides that, "If the board shall find and determine in favor of such sale, they shall then enter an order on their minutes, directing the auditor of the county to give such notice in the manner prescribed in § 306." No question is raised but that the board, at its session on November 5, 1902, described the property ordered to be sold as lots 17 to 21 and 32 to 35, both inclusive, of block 7, of King County Addition, as the same appears from the caption of the notice; though the findings, conclusions, and judgment relate specially to the property designated in the application for the writ of mandate.

We conceive it to be a general and salutary proposition of law, that "Statutes by the authority of which a citizen may be deprived of his estate must have the strictest construction, and the power conferred must be executed pre-

cisely as it is given, and any departure from it will vitiate the proceedings; and this is so whether it be in the exercise of a public or private authority, whether it be ministerial or judicial." Potter's Dwaris, Statutes and Const., pp. 146, 224, and 225 and notes; *Powell v. Tuttle*, 3 N. Y. 396; *Sherwood v. Reade*, 7 Hill (N. Y.) 431. The order of the commissioners directed the lots in block seven (7) to be advertised and offered for sale, which the county auditor failed to do, but instead, noticed for sale lots in a different block. This the auditor had no authority to do. The caption is no part of the notice. Parties wishing to bid on the property advertised for sale would naturally look to the body of the notice, rather than to the caption for a correct description, and, in case of a discrepancy, would regard the description designated in the body of the notice as referring to the property intended to be offered for sale. § 308 of Bal. Code, referring back to § 306, requires that the notice "shall particularly designate and describe the property." It is self-evident from a mere reading of the notice that the property in question was not so designated and described. Evidently the object of the law is to secure the best price possible for the property of the county offered at public sale, and that the public may know the particular property on which bids are to be invited at the time and place of sale, so that no evidence *aliunde* may be necessary for its identification. The accuracy and sufficiency of the notice must be tested by the statute. It was impossible for the learned trial court to say whether any one was misled by this discrepancy. *Frazier v. Steenrod*, 7 Iowa 339, 71 Am. Dec. 447; Wade, Law of Notice, § 1088. The powers of the county board and the county officials with reference to the disposition of the property in question were measured by the statutory provisions above noted. They cannot be deviated from or enlarged upon by any party or official

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in matters of substance, attempted to be exercised in that behalf, without invalidating the proceedings. Therefore we are unable to see that the position of relator is in any wise strengthened by any act or agreement had with the treasurer and sheriff with reference to this notice of sale. But on the other hand, the facts, as they appear in the findings of the trial court, tend to show that the notice was misleading. If not, why did the relator, at the time of the sale, feel impelled to direct the attention of the sheriff and deputy treasurer to the discrepancy? The general principle of law is applicable to these proceedings "that where special proceedings are authorized, by which the estate of one may be divested and transferred to another, every material step in the course of the proceedings must be pursued." *Reynolds v. Wilson*, 15 Ill. 396, 60 Am. Dec. 753.

We are therefore of the opinion that the judgment must be reversed, and the case remanded to the superior court with directions to quash the peremptory writ of mandamus and dismiss the proceedings, at the cost of the relator, and it is so ordered.

[No. 4811. Decided December 21, 1903.]

LARS O. LONE, *Administrator of the Estate of Joseph M. Rex, Deceased, Respondent*, v. THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, *Appellant*.¹

LIFE INSURANCE—STALE DEMAND—FAILURE TO PAY PREMIUMS—NOTICE OF FORFEITURE—LAPSE OF POLICY IN MUTUAL COMPANY. Where the insured pays the first semi-annual premium upon a life policy in a mutual company, and for twelve years neither pays or offers to pay any premium, an action by his administrator, based on the theory that the statutory notice of forfeiture was not given, will be dismissed for the reason that the demand is

¹Reported in 74 Pac. 689.

a state one, irrespective of statutory regulations as to forfeitures, as the statute will be considered waived and the policy rescinded by the insured.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 14, 1903, upon findings in favor of the plaintiff, after a trial on the merits before the court, a jury being waived. Reversed.

Struve, Hughes & McMicken, for appellants, to the point that the insured had rescinded the policy and waived the statutory provisions for notice of forfeiture, cited: *Sedgwick, Constr. of Stat. & Const. Law*, p. 86 (2d ed.); *Cooley, Const. Lim.*, p. 214 (6th ed.); *Smith v. New England Mut. Life Ins. Co.*, 63 Fed. 769; *Hopkins v. Phoenix Ins. Co.*, 78 Iowa 344, 43 N. W. 197; *Shutte v. Thompson*, 15 Wall. 151; *Swain v. Seamen*, 9 Wall. 254; *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906.

Frank B. Wiestling and John L. Neagle, for respondent, cited: *Griesemer v. Mut. L. Ins. Co.*, 10 Wash. 202, 38 Pac. 1031; *Mutual Life Ins. Co. v. Hill*, 97 Fed. 263; *New York Life Ins. Co. v. Orlopp*, 25 Tex. 284, 61 S. W. 336; *Mutual Life Ins. Co. v. Dingley*, 100 Fed. 408; *Hathaway v. Mutual Life Ins. Co.*, 99 Fed. 534; *Griffith v. New York Life Ins. Co.*, 101 Cal. 627, 36 Pac. 113; *Baxter v. Brooklyn Life Ins. Co.*, 119 N. Y. 450, 23 N. E. 1048; *American Fire Ins. Co. v. Brooks*, 83 Md. 22, 34 Alt. 373; *Washington Life Ins. Co. v. Berwald* (Tex.), 72 S. W. 436; *Hill v. Mutual Life Ins. Co.*, 113 Fed. 44.

DUNBAR, J.—Appeal from a judgment rendered in favor of the administrator of the estate of Joseph M. Rex against the Mutual Life Insurance Company of New York, on a policy issued November 8, 1889, upon the life of Joseph M. Rex. Rex paid but one semi-annual premium, which was a

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condition of the delivery of the policy. He lived for nearly twelve years thereafter, dying on the 1st day of August, 1901, during which time he never paid, or offered to pay, any premium. The usual allegations in relation to the issuing of the policy are made in the complaint, and the further allegation that said insurance policy was to be construed according to the laws of the state of New York. At the time of the issuing of said policy, a statute was in force in said state of New York to the effect, in substance, that no policy should be forfeited for nonpayment of any premium, unless, at least thirty and not more than sixty days prior to the day when the premium was payable, notice had been mailed to the assured, stating the amount of premium, when due, to whom, and where payable, and that if not paid when due said policy would become forfeited and void; and it is alleged that no such notice was given. The respondent relies upon the case of *Griesemer v. Mutual Life Ins. Co. of New York*, 10 Wash. 202, 38 Pac. 1031, and the kindred case in 10 Wash. 211, 38 Pac. 1034, holding that a contract of insurance issued in the state of New York is to be construed with reference to the laws of that state. But whether or not this case falls within the rule and reasoning of the *Griesemer* cases, *supra*, and whether or not subsequent amendments to the statute in New York could affect contracts entered into under preexisting laws, are subjects which we deem it unnecessary to discuss; for, conceding that the contract was to be construed with reference to the New York statute relied upon by the respondent, we do not think the respondent should recover in any event, for it appears that the claim is a stale one. When a man neglects for twelve years to make annual or semi-annual payments provided for in an insurance contract, and never in fact makes any deferred payment whatever,

in the absence of a showing to the contrary, he ought to be held to have rescinded the contract which was made with special reference to such payments; they being in fact the actual consideration for the performance of the contract on the part of the insurance company. The statute, it is true, provides that no life insurance company shall have power to declare forfeited or lapsed any policy by reason of the nonpayment of any annual premium, unless notice be given in a specified manner; but a statute must be construed, and its provisions enforced, with reference to its objects; and the legislature, taking into consideration the infirmities of memory, enacted this statute for the purpose of preventing insurance companies from taking what in homely phrase is termed "snap judgment" on its patrons, thereby depriving them of the benefit of contracts by reason of slight negligence on their part, and when there was no real intention to rescind—a beneficent and just law if enforced in the spirit of its enactment, but oppressive and unjust if construed with narrow and literal exactness. This was not a law enacted in the interest of public policy, rights under which could not be waived, but it was made for the benefit of individuals who have power to waive the rights conferred. Statutory rights and even constitutional rights may be waived. Cooley's Const. Lim., p. 214 (6th ed.).

The real question at issue is, was the conduct of Rex such as to warrant the action of the company in declaring the contract rescinded, and proceeding with its business and making its calculations as though the contract were so rescinded. In speaking of a case similar in principle, though somewhat different in facts, the court, in *Smith v. New England Mutual Life Ins. Co.*, 63 Fed. 769, said:

"The assured acquiesced in the company's position—that his policy had lapsed—and accordingly neither paid nor

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tendered subsequent premiums, but treated the policy as a security simply for the interest acquired under the statute. Had his life been continued the claim now made would never have been urged or thought of; his early death alone suggested it."

We are satisfied that the thought never occurred to Rex during his lifetime that he had a claim against this company on the policy which had been issued so many years before; or, if he did, after the lapse of any appreciable time, it was a dishonest thought, for he knew that he had not performed the duties which devolved upon him under the contract, and that he had no rights thereunder; and there seems to be no just reason why his administrator should demand rights which he had virtually waived. In *Shutte v. Thompson*, 15 Wall. 151, 21 L. Ed. 123, where a party was standing upon his statutory right in relation to the notice concerning depositions, the court said, that it was not doubted that all the provisions of the statute respecting notice to the adverse party could be waived by him; that a party could waive any provision, either of a contract or of a statute, intended for his benefit; and that, if a course of action on his part had misled the other party, he ought not to be allowed to avail himself of his original rights, because under such circumstances he would be availing himself of what was substantially a fraud, and that he should not be allowed to reap any advantage from his own fraud.

This is a mutual life insurance company, and in the case of *Mutual Life Ins. Co. v. Phinney*, 178 U. S. 327, 20 Sup. Ct. 906, 44 L. Ed. 1088, a case which involves the construction of the statute relied upon here, the court, without actually deciding the proposition, said:

"Now, whether the insurance company, if the law of New York be applicable, could insist upon a forfeiture without giving the notice prescribed by the statutes of that

state, and, enforcing it, forfeit all premiums paid, all obligation for the return of the surrender value, all right of the insured by subsequent payments to continue the policy in force, is one question. But it is a very different question whether the executrix of the insured, after his long delinquency in the payment of premiums, can enforce the contract as against the other insured parties, thereby diminishing their interest in the accumulated reserve. Ordinarily no one can enforce a contract unless on his part he performs the stipulated promise, and it may be that this rule is operative in this case."

And while the court declined to decide the question because it was not necessary for the determination of the case, it evidently assumed that the rights of the policy-holders in mutual companies were worthy of consideration. So that in this case, this being a mutual life insurance company, the action of Rex, in seemingly abandoning his contract, affects every stockholder in the company, thereby, if he should prevail, diminishing their interest in the accumulated reserve.

From every consideration of justice and fair dealing, we think the respondent should not be allowed to recover in this case. The judgment will therefore be reversed, and the cause remanded with instructions to render judgment in favor of the defendant for costs.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

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Citations of Counsel.

[No. 4731. Decided December, 21, 1903.]

HUGH CALLAHAN, *Plaintiff*, v. THE AETNA INDEMNITY
COMPANY *et al.*, *Respondents*, and RALPH W. SMITH,
Appellant.¹

MARITIME LIENS—MATERIALS FOR CONSTRUCTION OF SHIP—FURNISHED BY CONTRACTOR AS AGENT FOR BOTH PARTIES. Where materials suitable for building wooden ships are placed in charge of the manager of a ship building plant with instructions to use them in any ships constructed by him and to sell to the best advantage, the owner has a lien upon a ship for the value of any materials so used in its construction, under § 6077 Pierce's Code, and the fact that such agent is the principal contractor for the construction of the ship and also agent of the ship owners does not defeat the lien, as it does not show a sale on the personal credit of the contractor, or release him as plaintiff's agent to sell the material.

Appeal from a judgment of the superior court for Pierce county, Huston, J., entered February 7, 1903, upon the findings and decision of the court, dismissing a cross complaint for a lien against a ship after a trial on the merits; and also from an order entered February 9, 1903, discharging the receiver of the vessel. Reversed.

F. S. Blattner, for appellant. The law does not require a stipulation for a lien. *Jones v. Swan*, 21 Iowa 181; *Morman v. Carroll*, 35 Iowa 22; *Montandon v. Deas*, 14 Ala. 33; *Eufaula Water Co. v. Addyston etc. Co.*, 89 Ala. 552, 8 South. 25. When any part of the material was appropriated by the builder for any particular ship, it was furnished for the construction thereof, within the statute. *Briggs v. A Light Boat*, 7 Allen (Mass.) 287; *Fearings v. The Myrtle*, 2 Ohio Dec. 175.

J. M. Ashton and *W. L. Sachse*, for respondent. There was no lien because no intent was shown to use the mate-

¹Reported in 74 Pac. 693.

rials in any particular ship at the time when the credit was given. Boisat, Mech. Liens, §§ 244, 867, 869; *Meredith v. Kunze*, 78 Iowa 111, 42 N. W. 619; *Fuller v. Nickerson*, 69 Me. 228; *Purinton v. Hull of a New Ship*, Fed. Cas. No. 11,472. Phillips, Mech. Liens, § 166 (2d ed.).

MOUNT, J.—This is an action to foreclose a lien for materials used in the construction of the barkentine "John C. Meyer." The trial court found that the materials used, and for which appellant claims a lien, were not furnished for the construction of said vessel, and therefore denied the lien. The undisputed facts are substantially as follows: On the 26th day of December, 1901, appellant purchased a certain lot of personal property, consisting of lumber, copper, yellow metal, spikes, iron and clinch rings, and other materials useful for construction of wooden vessels. This material was then situated upon real estate belonging to John B. Hardy, in the city of Tacoma. Appellant left this material where it was at the time he purchased it, and placed the same in charge of Mr. Hardy, and directed him to use it in the construction of vessels and sell it to the best advantage.

Subsequently, in March, 1902, the Hardy Ship Building Company, of which Mr. Hardy was manager, entered into a contract with the respondents Sudden & Christenson to complete the barkentine John C. Meyer, then in frame in the ship yards on Mr. Hardy's property, near the location of the material above named. Some of this material was then used by Mr. Hardy in the construction of the said barkentine, and some in other vessels then and there also under construction. For the materials used by Mr. Hardy in the construction of the vessel named, appellant claims a lien.

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§ 6077, Pierce's Code, provides as follows:

"That all steamers, vessels, and boats, their tackle, apparel and furniture, are liable. . . . (2) For work done or material furnished in this state for their construction, repair, or equipment at the request of their respective owners, . . . and every contractor, builder, or person having charge . . . of the construction, alteration, repair, or equipment of any steamer, vessel, or boat, shall be held to be the agent of the owner for the purposes of this chapter, . . ."

Respondents contend that, inasmuch as the materials which were placed in charge of Mr. Hardy at the time they were delivered to him were not furnished for the construction of the vessel John C. Meyer, but were delivered to be used in vessels generally, and to be sold to the best advantage, therefore appellant is not entitled to a lien under the statute. The statute provides that vessels are liable for materials furnished "*for their construction.*" This language, no doubt, implies that, where the materials are furnished for a particular ship, such ship is liable therefor; and, where the materials are not so furnished, but are furnished to a dealer or general contractor upon individual credit, of course there is no liability upon a ship in which they may be used.

A number of authorities are cited by respondents to the effect that, where materials are sold and delivered to a contractor, without any knowledge on the part of the person furnishing such materials that they will be used in the construction of a particular vessel, no lien can be maintained against a vessel upon which such materials are used, because it is only where materials are furnished for the purpose named in the act that a lien is acquired. This seems to be the rule supported by textwriters and decisions cited from other states, as well as by our own decisions in *Eisenbeis v. Wakeman*, 3 Wash. 534, 28 Pac.

923; *Whittier v. Puget Sound Loan etc. Co.*, 4 Wash. 666, 30 Pac. 1094, 31 Am. St. 944; and *Heald v. Hodder*, 5 Wash. 677, 32 Pac. 728.

But this rule is not applicable to the facts in this case. These materials are not shown to have been sold to Mr. Hardy at all. They were left in his charge to be used in the construction of vessels, and to be sold by him to the best advantage. In other words, Mr. Hardy was merely an agent of appellant for the purpose of disposing of the materials. If Mr. Hardy, acting as such agent, had sold the materials for the construction of a certain vessel in which the materials had been used, certainly appellant, who was the owner of the materials at the time of such sale, would have been entitled to a lien against the particular vessel for which the materials were furnished. The fact that appellant made Hardy his agent, and delivered the materials to him in December, 1901, did not make Hardy personally liable for the value of the materials at that time. Nor did the fact that subsequently, in March, 1902, Mr. Hardy took the contract, as manager of the Hardy Ship Building Company, to construct the John C. Meyer then in frame, release him as agent for the appellant for the purpose of selling the materials. Subsequent to that time, and while he was agent both for the construction company and for appellant, the materials were used in the construction of the ship. The fact that Hardy was agent for both the appellant and the construction company, when the materials were furnished and used, did not affect appellant's right to a lien. The time when Hardy furnished the materials to himself, or rather to his construction company, was the time when they were furnished for the vessel.

Respondents in their brief seem to assume that when the materials were placed in charge of Mr. Hardy by ap-

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pellant, in December, 1901, they were at that time sold to him. If this assumption is correct, then no doubt the case falls within the rule contended for. The only evidence in the record upon this point is the evidence of Mr. Hardy as follows:

"Well, I was really the representative of Smith and this material was in my charge, and I was also the contractor, or the chief contractor, of the vessel. The material was left by him to be used in any of the vessels that we might construct over there, and to be sold at the best advantage that I could for Mr. Smith. I do not know that there was any agreement ever made by Mr. Smith and Sudden & Christenson or the Aetna Indemnity Company. I never heard of any."

This evidence certainly does not support the contention that the materials were sold by appellant to Mr. Hardy upon his individual credit, at the time they were placed in his charge. If Mr. Hardy ever became personally liable for the materials, such liability did not attach until Mr. Hardy took the materials and used them for his own benefit. There is no evidence that he so used them. What he did was this: As agent for appellant, he furnished these materials for the construction of the ship, of which he was also agent. The materials were used in the ship. The case stands then the same as though appellant himself had furnished the materials to the construction company at the time they were used, and for the purpose for which they were used. These facts bring the case squarely within the terms of the statute, and appellant was entitled to a lien for the amount of his claim.

The judgment is therefore reversed, and the lower court is directed to enter judgment as prayed for in the complaint.

FULLERTON, C. J., HADLEY, ANDERS, and DUNBAR, JJ.,
concur.

[No. 4750. Decided December 23, 1903.]

E. F. JOHNSON *et al.*, Respondents, v. WATSON H. BROWN
et al., Appellants.¹

BOUNDARIES—GOVERNMENT MEANDER—LAKE SHORE—TITLE OF UPLAND OWNER. Lands lying between the government meander line of a navigable lake and the line of ordinary high water is the property of the upland owner, the meander being only for the purpose of ascertaining the area.

EJECTMENT—DEFENSES—ADVERSE POSSESSION—WHEN CONTINUOUS—EVIDENCE OF ABANDONMENT—SUFFICIENCY. Where in ejectment it appears that defendant, a squatter, who claimed by adverse possession for ten years, had attempted to enter the land in dispute as a homestead, and that, after the land department rejected his entry, he sold his improvements and went away for several months, there was sufficient evidence of abandonment to support a verdict for the plaintiff upon the theory that his possession had not been continuous, although it appeared that he afterwards returned and resumed possession, built a house, and commenced to pay taxes.

Appeal from a judgment of the superior court for King county, Griffin, J., entered April 11, 1903, upon the verdict of a jury rendered in favor of the plaintiffs in an action of ejectment. Affirmed.

John E. Humphries and *Harrison Bostwick*, for appellants.

Henry W. Lung and *C. W. Corliss*, for respondents.

PER CURIAM.—This is an action in ejectment by respondent E. F. Johnson to recover lot 10, block 10, Burke's Addition to the city of Seattle. Appellants claim title by right of open, notorious, adverse possession for more than ten years prior to the commencement of this action. The land in question is a part of lot 1, sec. 19,

¹Reported in 74 Pac. 677.

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tp. 25, N., R. 4 E., W. M. The township was surveyed by the United States government in the year 1855, and the northeast corner of sec. 19 was described as being on the meander line on the west shore of Lake Union, when in fact it stood a few rods west from the shore of said lake, leaving a strip of land containing about two and one-half acres between the meander line and the waters of the lake. The small piece of land extending into the lake at this point is designated by the government surveyor as lot 1.

In the year 1866 the United States patented said lot 1, together with other lands, to one Henry A. Webster, and in 1883 all of lot 1, including the land in controversy, was platted into lots and blocks, and became Burke's First Addition to the city of Seattle. Lot 10 comprises a portion of the land lying between said meander line and the lake, and plaintiff claims title thereto by virtue of mesne conveyances from the United States, and he has paid taxes thereon from 1888 to 1900, inclusive. In the year 1889 defendant Watson H. Brown squatted upon the strip, which embraces the principal part of block 10 and all of lot 10, on the theory that it was in sec. 20, and was government land, subject to homestead entry. The commissioner of the general land office affirmed the decision of the local land office in rejecting Brown's application to file a homestead thereon, and held that there was no land in sec. 20 on the west side of Lake Union, and held substantially that the land in question was in lot 1, sec. 19, which had previously been patented to said Webster.

It is the universal holding of the courts, that lands lying between the meander line of navigable lakes and the line of ordinary high water is the property of the upland owner; that the meandering of the lake is not for the purpose of limiting the amount of land disposed of, but

for the purpose of determining the amount of land within the fractional section for which the purchaser must pay. *Washougal & La Camas T. Co. v. Dalles, etc. Co.*, 27 Wash. 490, 68 Pac. 74. This, it seems to us, determined the legal title to the property. The defendant remained in possession, however, and cleared and fenced the property, and built a cabin thereon, and had the use and benefit of the property until along about the years 1896 or 1897, when he sold some of the improvements and went away to Spokane. After a few months he returned, built a house on the lot in question, and resumed occupancy.

The jury were properly instructed that, if they found from the evidence that the defendant had been in continuous, open, notorious, and adverse possession of the premises for more than ten years, they should find for defendant. The evidence showed, that the land department had decided adversely to the defendant's claim that the tract of land was government land and subject to homestead entry; and that, soon thereafter, he sold substantially everything that was of a movable character, and moved to Spokane. It is true that he returned in a few months, went upon another portion of the strip, built a house, and commenced, for the first time, to pay taxes upon this lot notwithstanding the plaintiff had previously paid the taxes upon it. The jury was evidently of the opinion that he had abandoned the land when he sold his improvements and went away. This was the controlling question in the case, for if he did abandon the land at that time, then his occupancy could not have been continuous for more than ten years. The jury found for the plaintiff, and the question of continuous, open, and notorious possession being a question of fact, purely within the province of the jury to determine, and there being substantial evidence in the record to support the verdict, the judgment is affirmed.

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Citations of Counsel.

[No. 4844. Decided December 23, 1903.]

33 591
40 238ADOLPH ZIEBELL, *Appellant*, v. ECLIPSE LUMBER COMPANY, *Respondent*.¹

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE MACHINERY—INDEPENDENT CONTRACTOR IN CHARGE OF MILL—CONTRACT TO MAKE REPAIRS—LIABILITY TO EMPLOYEE OF CONTRACTOR. Where defendant, the owner of a new shingle mill, enters into a contract whereby S, an experienced manufacturer, was to take charge of the mill, employ and pay all laborers and make all necessary repairs, and to receive a stipulated sum per thousand for all shingles manufactured out of timber furnished by defendant, the defendant to furnish new machinery required, which S was to install at his own expense, S stands in the relation of an independent contractor, and not of an agent, and defendant would not be liable for injuries sustained by an employe of S by reason of the machinery getting out of repair, since defendant did not agree to make repairs.

Appeal from a judgment of the superior court for Snohomish county, Denney, J., entered March 20, 1903, upon granting a motion for a nonsuit, dismissing an action founded upon employer's liability, no employment by defendant being shown. Affirmed.

G. M. Emory, for appellant, in addition to cases reviewed in the opinion, cited: *Piette v. Bavarian Brewing Co.*, 91 Mich. 605, 52 N. W. 152; *Coughtry v. Globe Wollen Co.*, 56 N. Y. 124; *Toledo etc. R. Co. v. Conroy*, 39 Ill. App. 351; *Neimeyer v. Weyerhaeuser*, 95 Iowa 497, 64 N. W. 416.

Robert A. Hulbert, for respondent. Squires was an independent contractor, and solely responsible for his own negligence. *Connors v. Hennessy*, 112 Mass. 96; *New Albany Forge etc. Mills v. Cooper*, 121 Ind. 363, 30 N.

¹Reported in 74 Pac. 680.

E. 294; *Reier v. Detroit Steel etc. Works*, 109 Mich. 244, 67 N. W. 120; *King v. New York Cent. etc. R. Co.*, 66 N. Y. 181, 23 Am. Rep. 37; *State v. Emerson*, 72 Me. 455; *Casement v. Brown*, 148 U. S. 615, 13 Sup. Ct. 672; *Humpton v. Unterkircher*, 97 Iowa 509, 66 N. W. 776. The defendant was under no obligation to keep the mill in repair. *Johnson v. Tacoma Cedar Lumber Co.*, 3 Wash. 722, 29 Pac. 451; *Samuelson v. Cleveland I. Min. Co.*, 49 Mich. 164, 13 N. W. 499; *Riley v. State Line S. Co.*, 29 La. Ann. 791, 29 Am. Rep. 249; *Knoxville Iron Co. v. Dobson*, 75 Tenn. (7 Lea) 367.

PER CURIAM.—This is an action for the recovery of damages for personal injuries alleged to have been sustained by appellant through the negligence of respondent, on March 3, 1902, while appellant was employed as a knee-bolter in respondent's shingle mill. The case proceeded to trial upon the merits before a jury. At the close of the testimony for the plaintiff, defendant moved for a nonsuit, and the motion was granted. Judgment was entered accordingly. From this judgment, the appeal is prosecuted.

The uncontradicted evidence shows, that the defendant was the owner of a shingle mill in the city of Everett; that, about two years prior to the accident, the Eclipse Lumber Company, the defendant in this action, entered into an oral contract with one Squires, wherein it was agreed that Squires should take charge of said mill, employ and pay all the laborers, and make all necessary repairs to the machinery, and manufacture shingles out of timber which was to be furnished by the defendant. The said Squires was to receive a stipulated sum per thousand for all shingles manufactured and delivered upon cars preparatory to their being delivered to the defendant's

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dry kiln. It was further agreed that, should any of the machinery become so worn that it was necessary to be replaced, upon a requisition being made by said Squires upon said company, the said company would furnish new machinery, but that the burden and expense of installing the same should be borne by Squires. It is conceded that, at the time this contract was made, the mill was new and in good condition. It is also conceded that Squires was experienced in this line of work, and that the managing officers of defendant company had little or no knowledge of the mechanical part of the business.

More than a month prior to plaintiff's injury he (plaintiff) discovered that one of the rails of the knee-bolter was broken. He notified Squires of the fact, and requested that it be replaced by a new one. The rail was then repaired, and plaintiff continued working as before. Shortly thereafter the rail was broken in another place. Plaintiff made complaint, and the rail was again repaired. After a few days the same rail again got out of order, and plaintiff made a third complaint about it to Squires, who promised to repair it on the following Sunday. He neglected to do so, and on Monday plaintiff went to work, and in an hour or so informed Squires of the condition of the rail, and Squires said he would see about it right away. He again neglected to do so, and afterwards, by reason of this neglect, the carriage was thrown off and plaintiff's hand forced against the saw, resulting in four of his fingers being cut off.

The questions presented are: (1) Is there evidence of actionable negligence on the part of Squires? (2) Did the relation of master and servant exist between defendant and Squires? (3) If such relation did not exist, is defendant liable? If the relation of master and servant did not exist between defendant and Squires, it is immaterial, so far

as this action is concerned, whether the evidence showed actionable negligence on the part of Squires, as Squires is not a party to this action. It seems to us that the questions of law presented may be more tersely stated as follows: Did the relation of master and servant exist between appellant and respondent, and was there evidence of actionable negligence on the part of the respondent? If Squires was the agent of the respondent, and the accident resulted through the negligence of Squires, the respondent would be liable on the principle that the master is liable for the acts of his agent, done within the scope of his authority.

Appellant relies for a reversal principally upon *Whitney v. Clifford*, 46 Wis. 138, 49 N. W. 835, 32 Am. Rep. 703, the circumstances of which are almost identical with those in the case at bar, with this important distinction, however: Clifford was to put the machinery in good repair, and to repair all breakages costing more than \$5. Clifford, it seems, failed to put the mill in good repair, and the damage for which recovery was sought was due entirely to his negligence; and, although the court suggests that "there was nothing in the contract which could be construed to create the relation of landlord and tenant," it seems clear to us that, even if the court had found that the relation of landlord and tenant did exist, still the defendant would have been liable, under the terms of his contract, for his negligence in failing to put the machinery in good repair at the outset.

In the case of *Nyback v. Champagne Lumber Co.*, 109 Fed. 732, the defendant was held liable for damages under a state of facts similar to those in *Whitney v. Clifford*, *supra*, solely because it was its duty to keep the machinery in repair. To the same effect is *Johnson v. Spear*, 76 Mich. 139, 42 N. W. 1092, 15 Am. St. 298, cited by ap-

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pellant. In the case of *O'Driscoll v. Faxon*, 156 Mass. 527, 31 N. E. 685, the court says:

"There was some evidence tending to show that the general plan adopted for protecting the bank from falling was inadequate. If the jury were of the opinion that it was so, and that the defendant failed to use reasonable care in making it safe against accidents, they might lawfully hold him responsible to one who was himself in the exercise of due care at the time of the injury."

It seems that in this case defendant Faxon had entered into a contract with one Smith to do certain mason work, provide proper protection to the work, and be responsible for all damages by accident, etc.; but he had himself done the excavating, and, while Smith agreed to be responsible for damages under the terms of the contract, that fact would not necessarily relieve Faxon. It was conceded that Faxon owed some duty to the laborers with reference to protecting the bank, and it seems to us that this fact distinguishes this case from the case at bar.

From a careful examination of the authorities, we are satisfied that the contract between Squires and the Eclipse Lumber Company did not create the relation of agency, but rather that of an independent contractor, and that the accident was not due to the negligence of the Eclipse Lumber Company. The judgment will therefore be affirmed.

[No. 4876. Decided December 29, 1903.]

JENNIE M. DIBBLE, *Appellant*, v. SEATTLE ELECTRIC
COMPANY, *Respondent*.¹

APPEAL—RECORD—NECESSITY OF STATEMENT OF FACTS—JUDGMENT WITHDRAWING CASE FROM JURY—PRESUMPTIONS IN FAVOR OF—ACCEPTANCE OF MONEY PAID IN SETTLEMENT OF CLAIM. Upon appeal from a judgment of dismissal of an action for personal injuries, which recites a trial and the introduction of evidence, and the withdrawal of the case from the jury solely upon the ground that plaintiff had ratified a release by the use of money claimed to have been paid in settlement, in the absence of a statement of facts bringing up the evidence on which such decision was made, the appeal will be dismissed, since all presumptions are made in favor of the judgment.

Appeal from a judgment of the superior court for King county, Bell, J., entered May 11, 1903, dismissing an action for personal injuries to a passenger upon a street car, upon withdrawing the case from the jury at the close of the testimony. Appeal dismissed and judgment affirmed.

L. H. Wheeler, N. S. Peterson, and J. J. McCafferty, for appellant.

Struve, Hughes & McMicken, for respondent.

MOUNT, J.—This was an action for damages on account of personal injuries. The complaint is in the usual form, claiming damages on account of negligence of the defendant. The answer, after denying the allegations of negligence and damages, sets up (1) contributory negligence on the part of the plaintiff and (2) a settlement between the parties and a release by plaintiff of all claims for damages arising out of the injuries. A reply denied the alle-

¹Reported in 74 Pac. 807.

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gations of the first affirmative defense, and alleged that the release pleaded by defendant was procured through fraud and deceit. Upon the trial, at the close of the testimony on behalf of both parties, the respondent moved the court to withdraw the case from the jury, and enter judgment in its favor. This motion was granted, and subsequently the following judgment was entered, omitting the formal parts:

"This action coming regularly on for trial on the 7th day of February, 1902, the plaintiff appearing in person and by her attorneys of record, and the defendant appearing by its attorneys, and said trial having been continued from day to day, and on the 17th day of February, 1902, the evidence on behalf of both the parties having been closed, and the parties having rested, and thereupon the defendant having moved the court to withdraw the case from the jury and direct judgment in favor of the defendant; and it appearing to the court that, in respect to the damages for personal injuries claimed by the plaintiff, and in respect to the cause of said injury and as to whether such injury to plaintiff was caused by the negligence of the defendant, there was a conflict in the evidence; and it further appearing to the court that, in respect to the condition and capacity of the plaintiff to enter into settlement of such demand at the time the same was claimed to have been made, and in respect to whether false representations were made by defendant to induce plaintiff to accept \$500 as such settlement, there was a conflict in the evidence; and it further appearing to the court by the evidence that, after the commencement of this action and after the filing of the plaintiff's reply, the the plaintiff had made use of a portion of the money claimed to have been paid her in such settlement, which in the opinion of the court was a ratification of the release, and for that reason it appearing to the court that said cause should be withdrawn from the jury, and judgment directed in favor of the defendant; and thereupon, for said reasons solely, said cause was by order of the court withdrawn from the jury, and judgment directed in favor of the de-

defendant, to all of which plaintiff excepted and her exception was allowed; and the motion of the plaintiff for a new trial having been duly argued and submitted to the court, and on the 7th day of May, 1903, the court, by its order duly made and entered herein, having overruled and denied said motion for the reasons above specified, and upon said reasons solely, and the plaintiff having excepted to said order and her exceptions having been allowed; now, by reason of the law and the facts, and the court being fully advised in the premises, it is considered, ordered, and adjudged by the court that judgment be and is hereby entered in this cause in favor of the defendant and against the plaintiff, and that this action be and the same hereby is finally dismissed, and that the defendant, the Seattle Electric Company, a corporation, do have and recover of and from the plaintiff, Jennie M. Dibble, its costs and disbursements in this action, to be taxed at \$—, and that execution issue therefor. Plaintiff excepts and her exception is allowed. Done in open court this 11th day of May, A. D. 1903."

Plaintiff appeals from this judgment.

No statement of facts is brought here, and respondent now moves to dismiss the appeal. This motion must be granted. The judgment recites that "after the commencement of the action and after the filing of plaintiff's reply, the plaintiff had made use of a portion of the money claimed to have been paid her in such settlement, which in the opinion of the court was a ratification of the release, and for that reason it appearing to the court that said cause should be withdrawn from the jury, and judgment directed in favor of the defendant; and thereupon, for said reasons solely, said cause was by order of the court withdrawn from the jury, and judgment directed in favor of the defendant." Without the facts which were before the trial court upon this question, this court cannot find that the decision of the trial court was error. The facts upon which this decision was based were apparently not dis-

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Syllabus.

puted. All presumptions are in favor of the judgment. *Johnson v. Spokane*, 29 Wash. 730, 70 Pac. 122; *Pierce v. Fawcett*, 31 Wash. 271, 70 Pac. 1011; *Schlotfeldt v. Bull*, 22 Wash. 362, 60 Pac. 1126.

The motion is therefore sustained, and the judgment is affirmed.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4843. Decided December 29, 1903.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM D. FETTERLY, *Appellant*.¹

33	599
39	225
39	552

RAPE—PROSECUTRIX UNDER AGE OF CONSENT—EVIDENCE OF OTHER OFFENSES. In a prosecution for rape where the prosecutrix is under the age of consent, testimony of carnal intercourse between the parties at times other than the one charged is admissible.

SAME—INFORMATION—FORCE. Such rule is not changed by the charge of force in the information, as that is surplusage and does not change the nature of the proof required where the prosecutrix is under the age of consent.

SAME—AGE OF CONSENT—ALLEGING AGE—SUFFICIENCY. Charging the offense of rape upon a prosecutrix "of the age of sixteen years" sufficiently alleges that she was under the age of consent, eighteen years, as against objection first made after verdict.

VENUE—SUFFICIENCY OF EVIDENCE—JUDICIAL NOTICE OF LOCATION OF CITY. Proof that the offense of rape was committed in a house at a certain street and number in the city of Seattle is sufficient proof of the venue, as the courts take judicial notice that Seattle is in King county, Washington.

RAPE—PROOF OF MISCARRIAGE—COMPETENCY—CORROBORATION. In prosecution for rape of one under the age of consent, proof that the prosecutrix suffered a miscarriage within the period of gestation is competent to show that the crime had been committed, and as corroborative of the evidence of the prosecutrix that the defendant was the guilty party.

¹Reported in 74 Pac. 810.

SAME—CORROBORATION. The jury may convict for rape upon the uncorroborated testimony of the prosecutrix, when she testifies directly and positively to all the essential elements of the offense.

EVIDENCE—IMPEACHING—STENOGRAPHER'S TESTIMONY AS TO STATEMENTS AT FORMER TRIAL—WEIGHT. Where witnesses have denied making certain statements at a former trial, testimony of the stenographer that they made the statements ascribed to them is competent in rebuttal, and its weight is for the jury.

Appeal from a judgment of the superior court for King county, Griffin, J., entered March 13, 1903, upon a trial and conviction of the crime of rape. Affirmed.

Solon T. Williams (*R. H. Lindsay*, of counsel), for appellant.

W. T. Scott and *Elmer E. Todd*, for respondent.

FULLERTON, C. J.—The appellant, William D. Fetterly, was informed against for the crime of rape, alleged to have been committed upon the person of his stepdaughter, a female child of the age of sixteen years. He pleaded not guilty to the information, and a trial was had thereon, resulting in a verdict of guilty, on which he was adjudged guilty and sentenced to a term in the penitentiary.

The appellant first assigns that the court erred in allowing the prosecuting witness to testify to acts of carnal intercourse occurring between herself and the appellant at times other than the one charged in the information. In *State v. Wood*, ante, p. 290, 74 Pac. 380, we held that, in a prosecution for incest, it was permissible for the state to prove acts of incestuous intercourse between the defendant and the prosecuting witness occurring prior to the specific act charged in the information; this, not to prove a substantive offense upon which a conviction might be had, but on the same principle that evidence of the antecedent conduct and demeanor of the parties towards each

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other is admissible, as tending to show the probability of the commission of the specific act charged, and as corroborative of the testimony of the prosecuting witness. In principle there is no distinction, in this respect, between a prosecution where the charge is incest and a prosecution where the charge is rape upon a female child under the age of consent. The same reason that renders the testimony admissible in the one case renders it admissible in the other, and such is the effect of the authorities. *State v. Wood*, *supra*, and cases cited. Also, *State v. Robinson*, 32 Ore. 43, 48 Pac. 357; *People v. Abbott*, 97 Mich. 484, 56 N. W. 862, 37 Am. St. 360; *People v. Castro*, 133 Cal. 11, 65 Pac. 13; *State v. Peres*, 27 Mont. 358, 71 Pac. 162.

The appellant argues, however, that the information in this case charges a rape by force, and against the will of the prosecutrix, and that the rule above announced has no application for that reason. The information, it is true, does so charge, but it is also true that it charges that the prosecutrix was of an age when she was incapable of giving consent; and in such a case the allegations of force and nonconsent are mere surplusage, except in so far, perhaps, as proof that the carnal act was committed by the means of the one, or without the other, might tend to aggravate the offense. But the mere carnal knowledge of a female child under the age of consent is rape, whether the act be committed with or without force, or with or without consent, and the nature of the crime, or the proof required or permitted to sustain it, is not changed by the fact that the information charges the unlawful act to have been committed by force. *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *State v. Horne*, 20 Ore. 485, 26 Pac. 665.

The objection in this connection that the information does not allege that the prosecutrix was under the age of consent is without merit. The age of consent in this state

is eighteen years. The information alleges that the prosecutrix was, at the time of the offense, "of the age of 16 years." This is good as against an objection made for the first time after verdict. *People v. Gardner*, 98 Cal. 127, 32 Pac. 880; *State v. Newton*, 44 Iowa 47.

It is next claimed that the state failed to prove the venue of the crime; but it was not necessary, in order to sufficiently prove the venue, that some witness testify directly that the crime was committed in the designated place. It is enough if evidence incidentally given on the trial of the cause shows that the venue is properly laid. Here, the prosecuting witness testified that, at the time of the commission of the acts constituting the offense, she was living with the defendant and her mother "at 20th and Norman streets . . . in the city of Seattle," and that the act occurred at their house. This was sufficient proof of venue. The court knows judicially that the city of Seattle is in King county, state of Washington, and proof that the crime complained of was committed in that city is proof that it was committed within the jurisdiction of the court before which the defendant was tried.

A physician was permitted, over the objection of the appellant, to testify that the prosecutrix, subsequent to the time of the alleged rape, but within the period of gestation, had suffered a miscarriage. This is claimed as error, but we think the evidence competent. It was incumbent upon the state to prove that the crime alleged in the information had actually been committed, as well as the fact that the appellant had committed the crime. Proof that the prosecutrix gave birth to a child, or suffered a miscarriage, while within the age of consent, is proof that she had been carnally known by some one while within that age; and in this case this evidence was proof that the crime charged had been committed. We think, also, it was cor-

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roborative of the evidence of the prosecution to the effect that the defendant was the guilty party. It conclusively proves her testimony to the effect that the crime charged was committed, and the truth of that lends credence to her testimony to the effect that the person she names is the guilty party. *State v. Robinson*, 32 Ore. 43, 48 Pac. 357; *People v. Flaherty*, 27 N. Y. App. Div. 535, 50 N. Y. Supp. 574.

It is complained that the evidence is insufficient to justify the verdict, and in this connection the appellant urges that the prosecutrix should be corroborated, and that here there was no corroborative evidence. The prosecutrix testified directly and positively to all of the essential elements necessary to constitute a complete offense, and, if her testimony is to be believed, the appellant is guilty of the crime charged. It may be that she was not corroborated in every particular, yet, notwithstanding this, the truth or falsity of her statements was a question for the jury. In this state there is no statute requiring that the prosecutrix be corroborated. *State v. Roller*, 30 Wash. 692, 71 Pac. Rep. 718. When, therefore, the evidence of the prosecutrix is, if true, sufficient to convict the defendant, and the jury find it to be true, this court cannot, without a usurpation of its authority, hold that the evidence is insufficient to warrant a conviction.

Two witnesses for the appellant were asked on cross-examination concerning their testimony given on a former trial of the cause, and denied making certain statements imputed to them by the questions asked. In rebuttal, the prosecution called the stenographer who reported the testimony given at the prior trial, and was permitted to show by him, over the objection of the appellant, that the witnesses had made the statements ascribed to them. This is assigned as error, apparently on the theory that the stenog-

rapher was incompetent to testify. But clearly such is not the rule. The stenographer is as competent to testify as to what the witnesses stated as is any other person who heard, or heard and made notes of, the testimony given at the former trial. The competency of his evidence being determined, its weight and sufficiency was, of course, for the jury.

Certain exceptions were taken to the instructions of the court, and to the refusal of the court to give certain others, requested by the appellant. These exceptions, however, involve only the different theories of the law involved in the questions already discussed, and require no further or separate consideration.

The judgment is affirmed.

HADLEY, MOUNT, ANDERS, and DUNBAR, JJ., concur.

[No. 4825. Decided December 29, 1903.]

ARCHIBALD C. DE VOE, *Respondent*, v. ELIZA R. RUNDLE,
Appellant.¹

33 604
38 53
e38 54
33 604
40 584

INFANCY—INVESTMENT IN OUTLAWED MORTGAGE—DISAFFIRMANCE—STATUTE OF LIMITATIONS—EFFECT OF MINORITY—RIGHTS OF SUBSEQUENT LIENORS. A minor who was induced by misrepresentations of the mortgagor to purchase the mortgaged premises, and, in order to acquire title, to invest in an outlawed mortgage, can not afterwards claim that the mortgage was revived as against subsequent lien holders whose rights had attached, or secure any priority over them on account of his minority.

STATUTE OF LIMITATIONS—MORTGAGES—REVIVAL OF LIEN—SUBSEQUENT JUDGMENT—PRIORITY—ARREST OF STATUTE. Where the statute of limitations has run against a mortgage, it can not be revived by any act of the mortgagor, as against a subsequent judgment lien, and upon foreclosure contested by the judgment creditor, he should be awarded priority.

¹Reported in 74 Pac. 836.

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Appeal from a judgment of the superior court for King county, Tallman, J., entered June 12, 1903, upon findings in favor of the plaintiff after a trial before the court without a jury, decreeing the foreclosure of a mortgage and denying the priority of defendant's judgment lien. Reversed.

Tucker & Hyland, for appellant, contended, among other things, that equity will not relieve from a mistake of law whereby the operation of a contract is different from what the parties intended. *Proctor v. Thrall*, 22 Vt. 263; *Hunt v. Rousmanier's Adm'rs*, 8 Wheat. 174; Story, Equity Jurisp. (10th ed.), §§ 114—116; *Burt v. Wilson*, 28 Cal. 632. Equity will not relieve from a mistake of law whereby judgment creditors' rights intervene. *Campbell v. Carter*, 14 Ill. 285; *Garwood v. Eldridge*, 2 N. J. Eq. 145, 290; *Bentley v. Whittemore*, 18 N. J. Eq. 366. Nor where general creditors' rights would be injuriously affected. *Anderson v. Tydings*, 8 Md. 427, 63 Am. Dec. 708. There was lack of diligence on the plaintiff's part. *Glen v. Statler*, 42 Iowa 107; *Bonney v. Stoughton*, 122 Ill. 536, 13 N. E. 833.

Charles R. Crouch, for respondent. A judgment creditor can not plead the statute of limitations to his debtor's mortgage, because he does not owe the debt, is not in possession of the property, and has no legal title thereto. *Blair v. Silver Peak Mines*, 84 Fed. 737; *Sanger v. Nightingale*, 122 U. S. 176, 7 Sup. Ct. 109, 30 L. Ed. 1105.

HADLEY, J.—On the 17th day of June, 1901, the appellant, Eliza R. Runkle, obtained a judgment in King county, Washington, against Arthur De Voe for the sum of \$455 and costs. Her judgment became a lien upon the real estate of said De Voe in King county, on and after said

date. Said De Voe was, at that time, the holder of the legal title of record to lot 4, block 13, in the D. T. Denny Replat of North Seattle. He was also the holder of such title on the 21st day of December, 1891, at which time he executed a mortgage upon said lot to Eugene E. De Voe, of Chatauqua county, New York. The mortgage was given to secure the payment of \$1,000, according to the terms of a promissory note bearing even date with the mortgage, and maturing three years after date, with interest at eight per cent per annum, payable semi-annually. Interest was paid upon the note up to December 20, 1892, and no subsequent payments of principle or interest were made. The note matured by its terms December 21, 1894, and the statute of limitations, unless in some manner arrested, had run December 21, 1900. On the 4th day of April, 1902, the said Arthur De Voe and wife conveyed the said lot by quitclaim deed to the respondent, Archibald C. De Voe. Appellant's judgment was unsatisfied at that time, and was still a lien upon said lot. The controversy here is whether the lien was subject or superior to that of the mortgage aforesaid.

Archibald C. De Voe is the son of Arthur De Voe, and about December 20, 1901, during the minority of the former, it is alleged that he was induced by the latter to invest funds he had received from his mother's estate in the lot above described. It is averred that the manner of the investment was as follows: Archibald C. De Voe was to purchase the mortgage held against the lot by said Eugene E. De Voe, and Arthur De Voe was to convey an unincumbered title. A number of unsatisfied judgments existed against Arthur De Voe at the time, including that of appellant, of which his son, the respondent, says he did not know. On or about January 3, 1902, the son sent the sum of \$500 to the eastern mortgagee to apply upon

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the mortgage, and on or about April 2, 1902, it is alleged the further sum of \$800 was paid by him in the same manner. On March 6, 1902, the mortgagee acknowledged a release and satisfaction of the mortgage, and this was filed for record in the auditor's office of King county April 7, 1902, at the request of respondent.

On substantially the above statement of facts, Archibald C. De Voe, the respondent, instituted this action, making Arthur De Voe and wife, Eugene E. De Voe, the mortgagee of the aforesaid mortgage, and the judgment creditors of Arthur De Voe, including appellant, parties defendant. The complaint alleges insolvency of Arthur De Voe, and asks that the aforesaid release of mortgage shall be set aside, and that the mortgagee shall be required to execute an assignment thereof to Archibald C. De Voe. Judgment is also demanded against Arthur De Voe and wife in the sum of \$1,300, together with a decree foreclosing the mortgage. The prayer concludes with the demand that the judgment creditors shall be barred and foreclosed of all rights in said property.

Appellant demurred to the complaint on several grounds—among others, that the action was not commenced within the time allowed by law, and that the complaint shows upon its face that the statute of limitations had run against the mortgage prior to the commencement of the action. The demurrer was overruled. Appellant then answered the complaint, putting in issue material allegations thereof, and, among other things, pleading affirmatively the statute of limitations against the mortgage. A trial was had before the court without a jury, and a judgment was entered effectually granting the prayer of the complaint. This is an appeal from the judgment by the defendant Eliza R. Runkle.

A large number of alleged errors are assigned—among others, that the court erred in overruling the demurrer to the complaint on the ground that the action was not brought within the time allowed by law. This question was also raised by objections and motions at the trial, the overruling of which is also assigned as error. We think this is the only question necessary to be discussed in the case, and we shall consider it as presented not alone upon demurrer, but upon the whole record, including the evidence.

There is nothing in the record which shows that the statute of limitations did not uninterruptedly run against the mortgage, and it therefore expired December 21, 1900. Arthur De Voe was still the owner of the lot, and remained such until June 17, 1901, when appellant recovered her judgment against him. Respondent had no interest in the mortgage at that time, and, under the allegations of his complaint, he acquired no interest until about January 3, 1902, when he made a payment of \$500. About April 2, 1902, he made a further payment of \$800. Meantime he attained his majority on March 4, 1902. The first payment was made when he was within about two months of having reached his majority, and the last one, about one month after he was twenty-one years of age. As to third parties, he certainly was required to take notice of existing conditions when he made his last payment, and when he accepted the conveyance of the land after his majority. In any event, we know of no rule that will permit a minor to invest in a mortgage that is outlawed at the time, and afterwards claim that the lien thereof shall prevail, as against other lien holders, for reasons alone growing out of his minority. We do not understand that this is seriously contended in this case, but the fact of minority is alleged in the complaint with some emphasis; and it is, perhaps, pertinent in support of the issue against respond-

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Opinion Per HADLEY, J.

ent's father, in order to show the confidential relation between the two, and reliance of the son upon the statements of the father that the son would acquire a good title.

The only question, therefore, is, can appellant, as the holder of a judgment lien against the mortgaged land, plead the statute of limitations against the mortgage? We have held that a subsequent grantee of the mortgagor may plead the statute, and that the absence of the mortgagor from the state will not suspend the running of the statute as to the mortgage executed by him, when he has parted with all his interest in the premises to such subsequent grantee, who has resided in the state continuously, and against whom the remedy of foreclosure has been at all times available during the running of the statute. *George v. Butler*, 26 Wash. 456, 67 Pac. 263, 57 L. R. A. 396, 90 Am. St. 733; *Denny v. Palmer*, 26 Wash. 469, 67 Pac. 268, 90 Am. St. 766.

We have further held that, when mortgaged premises have been conveyed to a subsequent grantee, payments made by the mortgagor on the mortgage indebtedness will not extend the running of the statute, as against such subsequent grantee, without his consent. *Hanna v. Kasson*, 26 Wash. 568, 67 Pac. 271. We have also held that partial payments by a mortgagor will not extend the statute, as against a judgment creditor of the mortgagor who has purchased the mortgaged premises under execution sale, under the principle that he has become vested with an interest and that the mortgagor cannot, by any act or stipulation, extend the limitation upon the mortgagee's right of foreclosure, as against the execution purchaser. *Raymond v. Bales*, 26 Wash. 493, 67 Pac. 269. Thus we have held that the running of the statute will not be arrestel, as against subsequent grantees or subsequent execution purchasers, for

the reason that the remedy by foreclosure is at all times available as against them.

It has not been directly held by this court that a mere judgment lien holder may plead the statute. In the last case cited above, the interest of the party pleading the statute was initiated by the judgment lien, but he had proceeded further, and that interest had ripened into an execution purchase under the judgment lien. In that opinion, however, as in others above cited, we followed and quoted from the opinion in *Wood v. Goodfellow*, 43 Cal. 185. A part of that quotation is as follows:

"But this court has repeatedly decided that as against subsequent incumbrancers, or a subsequent holder of the equity of redemption, the mortgagor has no power by stipulation to prolong the time of payment, or in any manner increase the burdens on the mortgaged premises."

It will be observed that, by the language above quoted, the California court, in referring to its former decisions, understood that it had applied the rule to subsequent incumbrancers in general. An incumbrancer is one who has a legal claim against an estate. 16 Am. & Eng. Enc. Law, 161. A judgment is an incumbrance, and the holder thereof is an incumbrancer. *Spangler v. Sanborn*, 7 Colo. App. 102, 43 Pac. 905; *Thatcher v. Valentine*, 22 Colo. 201, 43 Pac. 1031; *Willsie v. Rapid Valley Horse-Ranch Co.*, 7 S. D. 114, 63 N. W. 546; *Redmon v. Phoenix Fire Ins. Co.*, 51 Wis. 293, 8 N. W. 226, 37 Am. Rep. 830.

That the supreme court of California intended the term "incumbrancers," as used in the argument in *Wood v. Goodfellow*, to include judgment creditors, is made clear by the very recent decision in *Brandenstein v. Johnson* (Cal.), 73 Pac. 744. Precisely the same question was before the court in that case that is now before us in the case at bar. A subsequent judgment lien holder interposed the plea of

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the statute of limitations, as against a prior mortgage. The trial court decreed foreclosure of the mortgage, but held that the mortgage lien was subject and junior to the judgment lien. That decree was affirmed by the supreme court. The latter court, in its opinion, after reviewing the doctrine of *Wood v. Goodfellow*, said:

"It is true that in *Wood v. Goodfellow* the subsequent lien holder was a mortgagee, but no distinction is made in that case, or in other cases above cited, between a mortgage lien and any other valid lien; and in *Watt v. Wright*, *supra*, it was expressly held that the absence of a mortgagor from the state did not stop the running of the statute of limitations, as against the subsequent lien holder by attachment. See, also, the following cases decided before *Wood v. Goodfellow*: *Lord v. Morris*, 18 Cal. 490; *Low v. Allen*, 26 Cal. 143; *Belloc v. Davis*, 38 Cal. 242. The theory of all the cases above cited is that, while the general rule is that the plea of the statute of limitations is a personal privilege, that rule does not extend to subsequent property rights over which he has no control. See *Lord v. Morris*, *supra*."

It will thus be seen that the question presented here has been directly decided in California adversely to respondent's contention. When we adopted the rule governing the application of the statute of limitations in our own cases above cited, we conceded that there is conflict of authority upon the subject, but stated that the rule adopted in California, and some other states, appealed to us as the proper one, and that we should follow it. The late decision of *Brendenstein v. Johnson*, *supra*, is but a reannouncement of the doctrine theretofore applied by that court, and, as it is directly in point here, we see no reason why it shall not be followed, thus preserving the harmonious application of the principle heretofore adopted in our former decisions.

Under the issues and evidence in the case, respondent is entitled to his judgment against Arthur De Voe and wife,

and to a decree foreclosing the mortgage and barring all the defendants in the action except the appellant. The decree should, however, be modified so that the mortgage lien shall be declared to be subject and junior to the judgment lien of appellant. The cause is therefore remanded to the superior court, with instructions to modify the decree as above indicated.

FULLERTON, C. J., and MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 4836. Decided December 29, 1903.]

CAPEN SHANK *et al.*, Appellants, v. ETHEL A. WILSON,
*Administratrix, Respondent.*¹

MARRIAGE—PRESUMED FROM CONDUCT. In states where the common law marriage is not recognized, proof of the continued cohabitation of a man and woman, holding themselves out to be husband and wife, raises a presumption of a previous legal marriage.

SAME—REBUTTAL—SUBSEQUENT CEREMONY. The presumption of an earlier marriage from cohabitation and assertion in several states for many years, is not rebutted by proof of a recent ceremonial marriage between the same parties.

SAME—ESTOPPEL. A widow is not estopped from claiming such earlier marriage by the record in probate proceedings upon her husband's estate showing only the recent ceremonial marriage, and decreeing the marriage between the parties to be of that date.

APPEAL—REVIEW—HARMLESS ERROR. Error in the admission of improper testimony is harmless in an equity case tried *de novo* on appeal.

Appeal from a judgment of the superior court for King county, Tallman, J., entered June 18, 1903, denying a petition of collateral heirs to vacate and set aside a final order of distribution in favor of the widow of deceased.

¹Reported in 74 Pac. 812.

after a trial upon the merits before the court without a jury. Affirmed.

Frank C. Park, for appellant. The probate court having decreed, upon a contest, that the date of the marriage was in 1900, the time of the ceremony, and that decision being unappealed from, it is the law of the case, and binding upon the widow. *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671; *Howell v. Budd*, 91 Cal. 342, 27 Pac. 747; *Blythe Estate*, 112 Cal. 689, 45 Pac. 6; *Lythgoe v. Lythgoe*, 26 N. Y. Supp. 1063; *Bell v. Raymond*, 18 Conn. 91; *Krekler v. Ritter*, 62 N. Y. 372; *Swank v. St. Paul R. Co.*, 61 Minn. 423, 63 N. W. 1088. She can not show a previous contract marriage to establish her widowhood after having shown a ceremonial marriage in the same matter to establish her widowhood. *McCandless v. Yorkshire etc. Corp.*, 101 Ga. 180, 28 S. E. 663; *Lilley v. Adams*, 108 Mass. 50; *Jeffries v. Allen*, 34 S. C. 189, 13 S. E. 365; *Martin v. Boyce*, 49 Mich. 122, 13 N. W. 386; *Baltimore etc. R. Co. v. Pittsburg etc. R. Co.*, 55 Fed. 701. The former finding concludes her as to all facts that might have been offered to prove any marriage. *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398; *Wilkes v. Davies*, 8 Wash. 112, 35 Pac. 611, 23 L. R. A. 103; *Dolan v. Scott*, 25 Wash. 214, 65 Pac. 190; *Isensee v. Austin*, 15 Wash. 352, 46 Pac. 394; *Macdonald v. Frater*, 29 Wash. 422, 69 Pac. 1111. The evidence did not justify the finding of a previous marriage; the ceremonial marriage was substantial evidence to the contrary. *Kromer v. Kromer, supra*. The presumption of a previous marriage is only in aid of testimony that a ceremony was performed. *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84; *Jackson v. Jackson*, 80 Md. 176, 30 Atl. 752; *Robinson v. Redd's Adm'r* (Ky.), 43 S. W. 435. Respond-

ent was in court and competent to testify to such ceremonial marriage. *Goldwater v. Burnside*, 22 Wash. 215, 60 Pac. 409. Failing to do so, the presumption is that none existed. *Jackson v. Ill. Cent. R. Co.*, 46 La. An. 226, 14 South. 514; *The Joseph B. Thomas*, 81 Fed. 578. The evidence was not sufficient to raise the presumption of marriage. *In Re Wallace's Estate*, 49 N. J. Eq. 530, 25 Atl. 260; *Williams v. Herrick*, 21 R. I. 401, 43 Atl. 1036.

John E. Humphries and *Harrison Bostwick*, for respondent.

DUNBAR, J.—Edwin B. Shank died intestate, leaving property of the value of about \$11,000, which property was distributed to respondent, his widow, by the decree of final distribution. Appellants, who are heirs of the deceased, petitioned to set aside the final decree, and asked that one-half of the property be distributed to them, for the reason that it was acquired by deceased before his marriage to respondent on June 4, 1900, and was his separate property. All the facts set forth in the petition as grounds for opening the decree of distribution were admitted, but the date of the marriage was contested. The copies of the record of the court of King county having probate jurisdiction were introduced, showing a ceremonial marriage between respondent and deceased, at Tacoma, on June 4, 1900, and the judgment decreed the marriage at that time. Upon the introduction of this record, the appellants rested; whereupon the respondent introduced testimony tending to show that the respondent and deceased had lived and cohabited together for many years prior thereto, and were so living in 1894, prior to the acquisition of the property, and that they constantly held themselves out as such husband and wife.

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Opinion Per DUNBAR, J.

The material question in this case, upon which the appeal is based, is the date of marriage. It is insisted by the appellants that there was no sufficient showing of a holding out by the respondent and the deceased as husband and wife, or of their living and cohabiting together as husband and wife. But, without entering into a circumstantial analysis of the testimony in this regard, we think it is ample to sustain the finding of the court. The testimony shows, without any doubt, that these parties lived together as man and wife, introducing each other to their friends and neighbors as man and wife, visited with friends in that capacity, and were so generally understood to be, for many years prior to his death, in the states of Idaho, Missouri, and Washington, and in British Columbia. It is well established law, not necessitating the citation of authority, that the proof of continual cohabitation of a man and woman, and of a continual assertion that the marriage relation exists, and proof of such conduct as is consistent with the marriage relation, raises the presumption, in those states where the common law marriage itself is not held to be a legal marriage, that the ceremonial or legal marriage has preceded the acts mentioned.

But the appellants contend that this presumption is rebutted by the fact that a ceremonial marriage was shown in this case to have been performed subsequent to these manifestations; viz., on June 4, 1900. But we do not think that this necessarily follows. There are various reasons, religious and otherwise, which frequently prompt men and women to solemnize their marriage more than once, and we do not think that this fact ought to overcome the universally recognized presumption of legitimate marriage before the acknowledged cohabitation and holding out and assumption of the marriage relation.

In *Summerville v. Summerville*, 31 Wash. 411, 72 Pac. 84, in a case where the proof of the acknowledgment of the relation of husband and wife was not nearly so conclusive as it is in this case, it was held that it was sufficient to raise a presumption of ceremonial marriage, and in that case, was approvingly quoted, the following citation from 1 Bishop, Marriage, Div. & Sep., § 956:

"Every intendment of the law leans to matrimony. When a marriage has been shown in evidence, whether regular or irregular, and whatever the form of the proofs, the law raises a strong presumption of its legality; not only casting the burden of proof on the party objecting, but requiring him throughout, in every particular, to make plain, against the constant pressure of this presumption, the truth of law and fact that it is illegal and void. . . . It being for the highest good of the parties, of the children, and of the community, that all intercourse between the sexes in form matrimonial should be such in fact, the law, when administered by enlightened judges, seizes upon all probabilities, and presses into its service all things else which can help it, in each particular case, to sustain the marriage, and repel the conclusion of unlawful commerce."

The error alleged in relation to the admission of improper testimony is not material here because the cause is tried *de novo*. Neither do we think that there is any merit in the contention that the respondent was estopped by the record which she made from asserting a prior marriage.

The judgment is affirmed.

FULLERTON, C. J., and HADLEY and MOUNT, JJ., concur.

[No. 4798. Decided December 29, 1903.]

HENRY M. PETERS, *Appellant*, v. SWAN LEWIS, *et al.*,
Respondents.¹

APPEAL—REVIEW—EXCEPTIONS—SUFFICIENCY. Under one general exception to "each and all" of several findings separately stated and numbered, the court will not review the evidence, since that is equivalent to no exception.

SAME. Under a general exception findings will not be reviewed unless it appears that all are erroneous.

SAME—STATEMENT OF FACTS. If there are no sufficient exceptions to findings, the statement of facts will be struck out.

ADJOINING LAND OWNERS—SURFACE WATERS—DRAINAGE—DAMAGES FROM FLOW—PLEADING—COUNTERCLAIM FOR REMOVING LATERAL SUPPORT—SUFFICIENCY. In an action between adjoining land owners brought to enjoin the flow of surface waters and drainage collected on the defendant's premises, a counterclaim alleging that plaintiff had removed the defendant's lateral support, causing a slide and damage to buildings, and destroyed the natural surface of the ground, causing damage in the sum of \$1,000, is not demurrable for failure to state a ground for recovery, and the same is connected with the subject-matter of the action stated in the complaint, and is proper matter for counterclaim under Bal. Code, §§ 4913, 4913a.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 19, 1903, upon findings of the court and an advisory verdict of a jury rendered in favor of the defendants, dismissing an action to enjoin the flow of drainage, and awarding the defendants \$100 damages upon a counterclaim for the removal of lateral support. Affirmed.

H. E. Foster, for appellant. To the point that the counterclaim failed to state sufficient facts for the reason that the right to lateral support extends only to the land in its natural state, and that plaintiff was not liable for

¹Reported in 74 Pac. 815.

83	617
37	534
83	617
40	284
40	538
33	617
441	494

injury to the buildings where the excavation was not negligently done, counsel cited: *Gilmore v. Driscoll*, 122 Mass. 199; *Charles v. Rankin*, 22 Mo. 566; *Baltimore etc. R. Co. v. Reaney*, 42 Md. 117; *Rockwood v. Wilson*, 65 Mass. 221; *Thurston v. Hancock*, 12 Mass. 220; *Winn v. Abeles*, 35 Kan. 85, 10 Pac. 443. It is necessary to allege that the buildings did not contribute to the subsidence of the ground. *Smith v. Seattle*, 18 Wash. 484, 51 Pac. 1057, 63 Am. St. 910.

Ira Bronson, for respondent.

HADLEY, J.—This cause was once before in this court on appeal. *Peters v. Lewis*, 28 Wash. 366, 68 Pac. 869. The complaint alleged damages by reason of drainage from the defendants' adjoining premises. Relief by way of injunction was sought against a continuance of the drainage, and also recovery for accrued damage. A demurrer to the complaint was sustained by the trial court, and this court directed that it be overruled on the ground that the allegations were broad enough to include drainage of a collected and sewage character.

Upon the return of the cause to the superior court, the demurrer was overruled; and the defendants thereupon answered the complaint, denying its material allegations, setting up affirmatively matter in the nature of a counterclaim—damages to the defendants by plaintiff—and asking recovery from plaintiff. Issue was joined upon the answer, and a trial was had. A jury was impaneled to assist the court in passing upon the facts. Each of the parties requested the jury to make certain special findings. Special findings were made and returned, and the court adopted them in making its own findings. These were to the effect that the waters upon defendants' premises had not been collected in such a manner that the flow therefrom

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was a damage to plaintiff's property. It was also found that the plaintiff had removed the natural support of defendants' land, and, without sufficiently supporting it by artificial means, had caused it to slide or run away, to the damage of defendants in the sum of \$100. Judgment was entered that plaintiff shall take nothing, and that the defendants shall recover from plaintiff \$100 and costs. Plaintiff has appealed.

Respondents move to strike the statement of facts on the ground that no sufficient exceptions were taken to the findings of facts. The findings, as made by the court, are separately stated and numbered from 1 to 5 inclusive. One general exception was taken to all the findings, as follows: "The plaintiff hereby excepts to each and all of the conclusions of law and findings of fact made and entered by the court on May 19, 1903." It has been often held by this court that such exceptions are too general to constitute the exceptions required by law. When the court makes findings, and these are separately stated, numbered, and entered, specific exceptions thereto must be taken in order that the court may know what ones are claimed to be erroneous, and upon what particular points it is desired that the evidence shall be reviewed. *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636; *Cook v. Tibbals*, 12 Wash. 207, 40 Pac. 935; *Fremont Milling Co. v. Denny*, 12 Wash. 251, 40 Pac. 1062; *Ballard v. Keane*, 13 Wash. 201, 43 Pac. 27. Such general exceptions are, therefore, the equivalent of no exceptions. When no exceptions have been taken to the findings as entered by the court, the evidence will not be reviewed on appeal. *Montesano v. Blair*, 12 Wash. 188, 40 Pac. 731; *Stoddard v. Seattle Nat. Bank.*, 12 Wash. 658, 40 Pac. 730.

Some of the findings, at least, were correct, since they relate to the ownership by the parties of the respective ad-

joining lots. There appears to have been no controversy over these matters. Under a general exception, this court will not review the findings unless it appears that they are all erroneous. *Washington Liquor Co. v. Northwest Livestock Co.*, 18 Wash. 71, 50 Pac. 569; *Payette v. Willis*, 23 Wash. 299, 63 Pac. 254. There being no sufficient exceptions to the findings, they will not be reviewed here, and the motion to strike the statement of facts is granted.

It is, however, assigned that the court erred in overruling the appellant's demurrer to the first affirmative defense, and also to the counterclaim. The first affirmative defense in effect simply alleges that, if appellant was damaged, it was by reason of his own neglect, and not by any acts of respondent. It was not error to overrule the demurrer to this part of the answer.

The allegations of the cross-complaint or counterclaim were, in substance, that, after the defendants had erected valuable dwelling houses upon their lot, the plaintiff caused to be excavated and removed, the earth up to and abutting the line of said lot; that he removed the support of said lot to a depth of about ten feet, and thereby left the premises of the defendants without their natural lateral support, which caused defendants' land to slide, the foundations of their houses became weakened, and destroyed the natural surface of the ground on their premises; that the plaintiff neglected to maintain and keep in repair a bulkhead, which he had erected upon his adjoining premises; and, by reason thereof, the defendants' land slid, and caused the damage aforesaid. The damages were laid in the cross-complaint at \$1,000, and recovery was sought against the plaintiff.

We think the court did not err in overruling the demurrer to this counterclaim. The cause of action stated in the cross-complaint was connected with the subject-matter of the action stated in the complaint, and was, therefore,

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properly matter for a counterclaim. §§ 4913, 4913a, 2 Bal. Code. The allegations also stated a ground for recovery. *Parke v. Seattle*, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, 34 Am. St. 839.

The conclusions of law and judgment followed from the findings of facts, and since, as we have seen, the findings are not reviewable here, the judgment must stand, in the absence of other reviewable and reversible error. Such does not appear, and the judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR, and ANDERS, JJ., concur.

[No. 4688. Decided December 29, 1903.]

M. L. BUTLER, *Respondent*, v. JOE CARVIN *et al.*, *Appellants*.¹

DEED—FRAUD—UNDUE INFLUENCE—LIFE ESTATE—PLEADINGS—VARIANCE—FINDINGS OUTSIDE THE ISSUES. In an action to set aside a deed absolute on its face upon the ground of undue influence and coercion, in which the answer and the reply raise the further question whether the deed was intended as a mortgage to secure repayment of advances, a finding of fact that the deed was given under an agreement that the grantor should retain a life estate in the premises is not warranted by the issues presented or tried, and the variance is not such as is obviated by an amendment deemed to have been made.

SAME—INCONSISTENT FINDINGS. In such an action, the finding that the grantor retained a life estate is inconsistent with a finding that the deed conveying a fee simple was voluntarily executed without any threats or coercion and with full knowledge of its purport, and is not warranted by evidence tending to show that the deed was given on account of large advances made, and that the parties contemplated living together on the property.

SAME—DEED INTENDED AS A MORTGAGE—PLEADING—ISSUES RAISED BY ANSWER AND REPLY—FORECLOSURE. In an action to set

¹Reported in 74 Pac. 813.

aside a deed upon the ground of undue influence and coercion, where the answer alleges that the conveyance was made to defendants in consideration of money loaned to plaintiff to pay the purchase price and improve the property, and prays that if the deed be construed as a mortgage, the amount due be ascertained and the same be foreclosed, and issue is joined thereon by the reply, a decree of foreclosure is within the issues, and should be awarded where the evidence justifies such conclusion.

SAME—EVIDENCE—ADMISSION IN BRIEF. Where the appellants' brief shows a willingness to treat their absolute deed as a mortgage, foreclosure thereof will be decreed by the supreme court, although the evidence tends to show an absolute deed between members of a family, made to discharge an equity for large advances on the purchase price and improvements, and that the parties had contemplated living together on the property, but failed to agree.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered December 2, 1902, upon findings in favor of the plaintiff, after a trial before the court without a jury, granting plaintiff a life estate in the premises in controversy. Reversed.

Ellis & Fletcher, for appellant.

A. A. Knight and *W. McB. Perrin*, for respondent.

PER CURIAM.—This was a civil action instituted in the superior court of Pierce county by M. L. Butler, respondent, against Joe Carvin and Augusta Carvin, his wife, appellants, to set aside and cancel of record a certain deed, executed by respondent to appellant Joe Carvin on the 10th day of May, 1902, of lot 5, block 7524, in the city of Tacoma. The complaint alleges respondent's invalidism, her weakness of body and mind, and ignorance of business, all of which was well known to appellants; that, about the latter part of April, 1902, the appellants demanded of respondent a conveyance of the lot in controversy for moneys furnished to her son on conditions unknown to respondent,

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for which she was in nowise responsible, with the intention of fraudulently obtaining the title in fee to such lot (then owned and possessed by her) for appellants' use and benefit; that, in pursuance of such fraudulent representations, she conveyed such premises to appellant Joe Carvin, without consideration; that respondent was influenced and coerced by appellant Joe Carvin to execute this deed on May 10, 1902.

Appellants, by their answer, put in issue the material allegations of the complaint. For an affirmative defense they allege, that on or about the 9th day of January, 1901, respondent and her son, W. H. Lord, purchased of J. W. Richardson the premises in question, respondent paying on account of the purchase price \$200, and her son, the sum of \$350; that the title was taken in the name of respondent to be held by her jointly for herself and son; that, at the time of said purchase, there was a small frame house on this lot, scarcely fit for occupation; that respondent and her son, desiring to improve such dwelling, but not having the money for that purpose, applied to appellant Joe Carvin, a nephew of respondent and cousin of W. H. Lord, to loan them such moneys as should be required from time to time, for the purpose of rebuilding said premises, furnishing the same, paying taxes, etc., and generally such as might be necessary in fitting the same up as they should desire, and further to supply respondent with moneys for her support; that the moneys so furnished and advanced to respondent amounted, on the 10th day of May, 1902, to \$1,239.42; that, at said time, respondent and her son, finding the amount large and being unable to repay the same, agreed to convey the premises in satisfaction thereof, and the respondent thereupon did, with the advice, knowledge, and consent of her son, convey said premises to the respondent Joe Carvin, by warranty deed, which was duly record-

ed; that, from about the 15th day of April till the 15th day of June, 1902, appellant and respondent occupied the premises as a home, but at that time disagreements arose between the parties about a certain male associate of respondent, and appellants because thereof removed from the premises, leaving the same in the possession of the respondent, and that respondent has ever since remained in possession of such property; that, since the execution of this deed, appellant Joe Carvin expended additional sums in and about the improvement of the premises, amounting to \$188.50; and that no part of the above sums have ever been repaid to appellants. Appellants prayed that the fee simple title to this real estate be established in Joe Carvin; that, if after a full hearing the court should be of the opinion that such deed was in effect a mortgage, that the court find the amount due, and that said deed be foreclosed as a mortgage.

Respondent in her reply denies all the material allegations of the affirmative answer, asks judgment as prayed for in her complaint, and then proceeds to state, that if, after fully hearing all the evidence and proofs produced herein, the court should reach the conclusion that the deed executed by this plaintiff to Joe Carvin should not be declared null and void, but that the instrument was given for security for any indebtedness for which respondent was legally and equitably responsible to Joe Carvin, then this court should ascertain the amount of respondent's indebtedness to him (Carvin), and make such decree as shall be just and equitable to the parties to the action. The appellants requested the trial court to make certain findings of fact and conclusions of law, which requests were denied. Appellants excepted to each refusal. The following findings were made by the court:

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“(3) The court finds that there were not any threats, coercion, fraud, intimidation, or undue influence in the execution of said deed, but that said deed was executed freely and voluntarily by the plaintiff [respondent], with full knowledge of its purport on her part. (4) That said deed was not given to secure any definite sum of money, but in recognition of an equity which the defendant Joe Carvin had in the premises, by reason of having contributed so much to its value. (5) That, as a part of the consideration and as an inducement to the making of said deed, it was the contemplation of the parties and the agreement and understanding that the plaintiff should have the right to occupy said premises for a home as long as she should live, or so long as she should continue to occupy the same as a home.”

On the findings, the superior court stated three conclusions of law:

“(1) That the deed from the plaintiff, M. L. Butler, to the defendant Joe Carvin should be confirmed as an absolute conveyance of said property. (2) That the said deed should be modified to the extent that said conveyance is subject to a life use of said premises, for a home for said plaintiff during her natural life, or so long as she shall occupy the same as a home for herself, plaintiff to have the absolute and exclusive control of said property for her own use and occupancy; and, in case her abandoning said property as a home, or in the event of her death, full control and right of possession to at once revert to defendant Joe Carvin. (3) That the defendant shall have the right to enter said premises for the purpose of examining the same and making repairs, and for the prevention of waste.”

Appellants excepted to the 4th and 5th findings, and to the 2nd conclusion of law. Judgment was entered by the trial court in conformity to such findings and conclusions; from which judgment, defendants Joe Carvin and Augusta Carvin appeal to this court.

The principal contention presented by appellants' counsel at the bar of this court is that the judgment was not warranted by the pleadings and evidence. The superior court having found that appellants used no fraud, misrepresentations, or coercion in procuring the deed from respondent, who had full knowledge of its purport and effect, it is difficult to conceive how, under the well settled principles of legal and equitable jurisprudence, the trial court felt warranted in carving out a life estate, in favor of respondent grantor, in this real estate. The third finding of fact negatives all the allegations of the complaint as to any fraud, coercion, intimidation, or undue influence having been practiced or resorted to by appellants in order to procure such conveyance from respondent. It is a well established principle of law that the nature of the cause of action, in so far as affirmative relief on the part of the plaintiff is concerned, is determined by the allegations of the complaint, or the first pleading in the suit. Mr. Pomeroy, in Code Remedies, §§ 553, 554 (3d ed.), says:

"In these statutory provisions the doctrine that the proofs must correspond with the allegations is, in a somewhat modified form, united with the subject of amendment, by which the minor grades of the variance may be obviated. . . . Finally, if the divergence is total, that is, if it extends to such an important fact, or group of facts, that the cause of action or defense as proved would be another than that set up in the pleadings, there is plainly no room for amendment, and a dismissal of the complaint or rejection of the defense is the only equitable result."

This court held in *Murray v. Meade*, 5 Wash. 693, 32 Pac. 780, that where there is a variance between the pleadings and evidence, but the evidence is admitted without objection, on motion for a nonsuit, the court ought to consider the complaint amended to correspond to the proofs. To

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the same effect see *Brayton v. Jones*, 5 Wis. 117, and Dixon's note, Appendix, at page 627.

In view of the allegations of the complaint, the evidence, the above finding No. 3, and conclusion of law No. 1, above noted, we are of the opinion that the learned trial court erred, after having fully confirmed the validity of this warranty deed from respondent to appellant Joe Carvin, which in form conveyed the fee simple title to the grantee, in then proceeding by other findings and conclusions of law to declare that the grantor had a life interest and right of possession in this realty, according to some agreement or understanding had between the parties to the instrument at or about the time of its execution. This latter, if true, under issues properly tendered, would have required a reformation of the deed. The deed could not be upheld as an absolute conveyance and at the same time be charged with a life estate in favor of the respondent. These findings are manifestly inconsistent and cannot be sustained by the rules of law or principles of equitable jurisprudence applicable to the facts presented by the record in this case. We have no doubt that the learned judge who tried the cause, prompted by a strong desire to do justice in a disagreeable family controversy, endeavored to do equity between the respondent and Joe Carvin, but that he erred in going beyond the scope of the issues formulated by the pleadings and the evidence and in decreeing a new contract between the parties. This the trial court had no right to do.

We now come to a consideration of the mortgage feature of the transaction, under the fourth finding of fact. According to the allegations of the answer and reply, as well as the evidence, it was competent and proper for the trial court to consider and pass upon that feature, but the finding is indefinite in not stating the value of Joe Carvin's

equity in the property. The evidence discloses that respondent was weak in body, somewhat infirm in mind, unused to business methods, and trusted to her son and one Lincoln for advice in her affairs. Respondent denies that she consulted with Joe Carvin about her business matters, but it appears that she allowed her nephew, whom she raised from childhood as one of the family, to make contributions and advancements towards securing and improving this property as a home, jointly for the use and benefit of herself and appellants; that, shortly after the execution of this deed, these parties, while being upon the premises, quarreled about a male boarder, a friend of respondent, living there, and this caused appellants to remove therefrom. After taking into consideration the whole testimony, in connection with the new matter set up in the answer, the response thereto in the reply, and the willingness expressed in appellants' brief to reconvey the property to respondent, on condition that appellant Joe Carvin be reimbursed for the moneys expended, together with the fact that we think the evidence fully justifies such a conclusion, we have concluded to treat this deed from respondent to Joe Carvin as a mortgage, and to direct its foreclosure as such.

The judgment of the trial court, therefore, will be reversed, and the case remanded, with directions that an accounting be had between the parties as to the items of expenditures and advances made by Joe Carvin to respondent for her use and benefit with reference to this property and transaction; that, on such accounting, whatever balance may be found due from respondent to appellant Joe Carvin shall be declared a valid lien against said premises, and in default of payment within a time to be named by the court, the property shall be sold, as upon mortgage foreclosure proceedings, in the manner prescribed

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by law; that, on the further hearing of this cause, the parties shall be allowed to amend their pleadings, and introduce other and additional evidence, as they shall be advised.

We express no opinion, at this time, as to the legality or equity of the numerous items of expenditure and advancements, set up in the answer and bill of particulars of appellants, now appearing in this record. Such matters will more properly arise and be presented at the final hearing, to be passed on and determined by the trial court. Neither party will recover costs on this appeal.

[No. 4808. Decided December 29, 1903.]

88 629/
88 72/

WILLIAM FITZ HENRY, *Respondent*, v. LEWIS H. MUNTER
et al., *Respondents*, and THOMAS MATTISON,
Intervenor, Appellant.¹

APPEAL—RECORD—STATEMENT OF FACTS—REVIEW OF CONCLUSIONS OF LAW. A statement of facts is not necessary where the only question for review is whether the conclusions of law are justified by the findings of fact.

SALES—STOCK OF GOODS IN BULK—PRIVATE SALE OF BALANCE AFTER AN AUCTION. Where a storekeeper commenced selling her stock of dry goods and notions at auction January 20, realizing \$170 therefrom, a private sale January 23, of substantially all the balance for \$307, is a sale of a stock of goods in bulk, and void if no sworn statement of the vendor's creditors is given as required by Laws 1901, p. 222.

SAME—DUTY TO DEMAND LIST BEFORE PAYMENT—PURCHASER AS TRUSTEE—DISTRIBUTION OF PURCHASE MONEY. Laws 1901, p. 222, making it the duty of a vendee of a stock of goods in bulk to demand a list of the vendor's creditors before payment of the purchase price, etc., makes the debtor's goods a trust fund, and the vendee a trustee, for all the creditors; and where the list is not given upon demand, and the purchase price is paid into court,

¹Reported in 74 Pac. 1003.

the funds are to be distributed *pro rata* to all the creditors who are parties to the suit.

Appeal from a judgment of the superior court for Pierce county, Snell, J., entered June 3, 1903, upon findings in favor of the plaintiff after a trial before the court without a jury, dismissing intervenor's complaint interposed as a creditor to secure a distribution of the proceeds of a sale of merchandise in bulk. Reversed.

C. M. Easterday and Thomas Mattison, for appellant.

Fremont Campbell and E. E. Rosling, for respondents.

DUNBAR, J.—The facts found by the court are substantially as follows: That prior to the 20th day of January, 1903, defendant Sarah Hirschfield was conducting in the city of Tacoma a drygoods and notion store, in the ordinary course of trade, and had been so conducting the same for some time prior thereto; that, in accordance with a certain notice which was inserted in the Tacoma Daily News, she commenced selling her goods at auction on the 20th day of January, through plaintiff William Fitz Henry, as her auctioneer, and continued said auction sale until the 23d day of January, 1903, at which time Mr. Munter, of the firm of Munter & Johnson, defendants herein, proposed to said Sarah Hirschfield to take the balance of the stock then unsold, and to pay her therefor the sum of fifty cents on the dollar, invoice price; that Mrs. Hirschfield accepted said offer and said auction sale closed, and that evening, as per their agreement, they commenced taking the inventory of the balance of goods then unsold, and completed the same that night, and said Munter & Johnson removed said goods to their place of business in Tacoma; that plaintiff William Fitz Henry claims to have purchased said goods, and to have given Mrs. Hirschfield one

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dollar to bind the bargain; but he admits that his purchase of the same was not until after Mrs. Hirschfield had sold said goods to Munter & Johnson, of which fact he had knowledge, as he assisted Mrs. Hirschfield in negotiating the sale, and assisted in invoicing said goods for Munter & Johnson and Mrs. Hirschfield; and he further admits that he has never paid her anything for said goods except the sum of one dollar; that on the 31st day of January, 1903, Shirek Bros. & Semeria recovered a judgment against Mrs. Hirschfield, William Fitz Henry, and S. Simon, in the justice court for Tacoma precinct, Pierce county, and caused a writ of garnishment to be served upon Munter & Johnson; that certain orders were made upon Munter & Johnson, which were not complied with, and that another party, to wit, Charles L. Westcott, caused a writ of garnishment to issue against Munter & Johnson, garnishing any debts or moneys due from said Munter & Johnson to said Sarah Hirschfield; that plaintiff, William Fitz Henry, brings this action against Munter & Johnson for the purchase price of the goods and fixtures sold by Mrs. Hirschfield to Munter & Johnson; that Mrs. Hirschfield has been made a party defendant to this action, and has filed an answer disclaiming any right or interest in the proceeds of the sale of said goods to Munter & Johnson, or the money now in the registry of the court in this action; that said Munter & Johnson, not knowing to whom the \$307.46 (which was the amount paid for the balance of the goods held by Mrs. Hirschfield after the auction sale had ceased) should be paid, have brought the same into court, and deposited it with the clerk of the court, to be distributed by the court to whomsoever the court should adjudge to be entitled to the same; that on or about the 25th day of April, 1903, Thomas Mattison, as assignee of various alleged creditors of Sarah Hirschfield, by leave of court, filed

a complaint in intervention, claiming that the money deposited herein by Munter & Johnson should be distributed to the creditors of Mrs. Hirschfield, ratably, on the ground that the sale by Mrs. Hirschfield to Munter & Johnson was a sale in bulk, as contemplated by the laws of the state of Washington relative thereto, and that Mrs. Hirschfield never gave Munter & Johnson a list of her creditors and no such list was demanded.

The court finds, that while said auction was being carried on, prior to the purchase by said Munter & Johnson, there were sold to various parties the most valuable articles of the stock of goods, and there was realized therefrom the sum of \$170, which was ninety per cent. of the cost price thereof; that, after said sales, the balance, as hereinbefore found, was sold to Munter & Johnson as aforesaid, the amount paid being fifty per cent of the invoice price; that there then remained in Mrs. Hirschfield's possession some jewelry and some pieces of drygoods worth about \$35; that Mrs. Hirschfield gave full publicity to her proposed sale; and that said sale to Munter & Johnson was not in bulk, as contemplated by the laws of the state of Washington relative thereto; and ordered that the funds be distributed as follows: To Shirek Bros. & Semeria, the sum of \$50; to Charles L. Wescott, \$175; the balance to William Fitz Henry; which was in accordance with the stipulation entered into between Shirek Bros. & Semeria, Charles L. Westcott, and William Fitz Henry; and all the respective cases, which had been consolidated, were ordered dismissed without costs to any party; that the intervenor, Mattison, be dismissed from the action, and costs taxed in favor of plaintiff against him as to costs of intervention. From this decree the intervenor appeals.

A motion is made by respondents to dismiss the appeal for the reason that no statement of facts has been served.

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settled, and filed, or returned to this court in this cause, and that this court cannot, therefore, try this cause over again on the merits without reviewing the testimony taken in the court below. But this motion is not tenable for the reason that the only contention of the respondents is that the conclusions of law are justified by the findings of fact. The findings of fact and the conclusions of law being here, this court has full jurisdiction to try that question, and the statement of facts is not essential or necessary for that purpose.

We think the court erred in holding that this was not a sale of goods in bulk. § 1, ch. 109, Laws 1901, p. 222, provides as follows:

"It shall be the duty of every person who shall bargain for or purchase any stock of goods, wares, or merchandise in bulk, for cash, or on credit, before paying to the vendor, or his agent or representative, any part of the purchase price thereof, or any promissory note, or other evidence therefor, to demand of, and receive from, such vendor, or agent, or if the vendor or agent be a corporation, then from the president, vice-president, secretary, or managing agent of such corporation, a written statement, sworn to substantially as hereinafter provided, of the names and addresses of all the creditors of said vendor, to whom said vendor may be indebted, together with the amount of the indebtedness, due or owing, and to become due or owing, by said vendor to each of such creditors; and it shall be the duty of such vendor or agent to furnish such statement, . . ."

In this case the findings of fact show that the purchasers demanded this statement of facts of Mrs. Hirschfield, but that she refused to furnish the same. It would seem that it would make no difference what preceded the final sale. The fact remains that all the goods that Mrs. Hirschfield had left were not sold in the ordinary course

of trade, or by auction, but were sold in bulk to respondents Munter & Johnson. § 4 of the same act defines what is a sale in bulk as follows:

“Any sale or transfer of a stock of goods, wares, or merchandise out of the usual or ordinary course of business or trade of the vendor, or whenever substantially the entire business or trade therefor conducted by the vendor, shall be sold or conveyed, or whenever an interest in or to the business or trade of the vendor is sold or conveyed, or attempted to be sold or conveyed, shall be deemed a sale and transfer in bulk in contemplation of this act.”

We are all of the opinion that the sale of these goods was a sale in bulk, within the contemplation of the act, which also provides that such sale shall be void. We also think that the object of this law was to hold the goods of debtors under such circumstances as a trust fund for the benefit of all the creditors, and to hold the purchaser in possession as a trustee for such creditors.

This being so, the cause will have to be reversed, with instructions to distribute the funds pro rata to all of the creditors who are parties to the suit, including intervenor Thomas Mattison, and that whatever right William Fitz Henry may have to this fund is subject to the rights of all the other parties.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

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Syllabus.

[No. 4821. Decided December 29, 1903.]

GILBERT P. KIDDER, *as Receiver of the Independent Lumber Company, Respondent*, v. AVERILL BEAVERS
*et al., Appellants.*¹

CHATTEL MORTGAGE—FORECLOSURE—RIGHT TO CONTEST—COMPLAINT—SUFFICIENCY. A complaint by the receiver of an insolvent corporation to restrain the foreclosure of a chattel mortgage by sheriff's notice, under Bal. Code, § 5876, authorizing any party interested to contest the right to foreclose as well as the amount due, is demurrable for want of sufficient facts when it merely states that the receiver, after diligent inquiry, is unable to state whether the mortgage is valid, or how much of the debt is due, and desires to contest the same, without alleging facts showing that the mortgagee had no right to foreclose, or that the amount claimed is not due.

SAME—FRAUDULENT SALE BY OFFICERS OF CORPORATION. In such a case, the fact that the officers of the company had fraudulently sold the property to third persons, who were in possession, does not warrant the court in restraining the foreclosure where the mortgage was valid and past due.

SAME—RECEIVERS—LEAVE OF COURT TO FORECLOSE CHATTEL MORTGAGE. A mortgagee of personal property belonging to an insolvent corporation in the hands of a receiver is not required to obtain leave of court to foreclose the mortgage by sheriff's notice, where the property is in the possession of third persons claiming to have purchased it, and the receiver had never been in actual or constructive possession thereof.

RECEIVERS—RIGHT TO POSSESSION OF PROPERTY—CHATTEL MORTGAGES. Where a receiver of an insolvent corporation claims an interest in mortgaged chattels which were never in the possession of the corporation, he can acquire possession only by one of the methods that might have been pursued by the corporation; and the mortgagee, if a stranger to the action, may seize any property not in the possession of the receiver.

Appeal from an order of the superior court for King county, Bell, J., entered June 9, 1903, restraining the

¹Reported in 74 Pac. 819.

defendants from foreclosing a chattel mortgage, after a hearing upon affidavits of plaintiff's application for an injunction. Reversed.

James A. Snoddy (*I. D. McCutcheon*, of counsel), for appellants.

Peters & Powell, for respondent.

MOUNT, J.—On September 16, 1902, one George E. King was the owner, and in possession, of certain personal property. On that date he executed and delivered to one Eva Stevenson his certain promissory notes, and, to secure the same, executed a chattel mortgage upon the property above referred to. Two days later appellant Beavers became the owner and holder of said notes and mortgage. On December 22, 1902, said mortgage was filed for record. On May 7, 1903, default having been made in the payment of the notes, appellant Beavers caused a part of the property described in the mortgage to be taken by appellant Cudihee, as sheriff of King county, to be sold under statutory notice. Subsequent to the giving of the mortgage referred to, the mortgagor sold the property to the Independent Lumber Company, a corporation, which subsequently parted with the possession of the property. On May 6, 1903, respondent was appointed general receiver of the Independent Lumber Company, but had not taken possession of any of the property described in appellant's mortgage at the time when appellant Cudihee seized the same. On May 16 the respondent filed in the superior court of King county a complaint as follows, omitting the title:

"(1) That heretofore, in a cause then pending in the above entitled court, wherein W. L. Venable was plaintiff and the Independent Lumber Company and others were defendants, this plaintiff was appointed receiver to take

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possession of, by suit or otherwise, all the property of said Independent Lumber Company, an insolvent corporation.

"(2) That the defendant Averill Beavers is proceeding to sell, by notice through the sheriff of King County, certain personal property in said county, to-wit, One black stallion; one gray horse; one bright bay mare; one bay horse named Ned; one bay horse named Jim; one bay horse named Ginger; one $3\frac{1}{4}$ inch skein wagon, Bain make; one set of double work-harness and two sets double buggy harness; under an alleged mortgage, claimed to be given by the said George E. King and C. S. King to one Eva Stevenson, and by her assigned to said Averill Beavers, upon which there is said to be due three hundred (300) dollars and some interest; which said sale is noted to be held by the sheriff in the city of Seattle, at ten o'clock on Monday morning, May 8th, next; and the said sheriff, under and in pursuance of the request of said Beavers, is proceeding to sell, and will sell, the same unless enjoined by this court.

"(3) That the Independent Lumber Company is the owner of the horses and chattels above named, and their value is, as this receiver is informed and verily believes, largely in excess of the amount of the mortgage debt, interest and costs, and of to-wit, about six hundred (600) dollars.

"(4) That affiant is unable to learn from the officers or stockholders of the Independent Lumber Company whether or not said mortgage and mortgage debt are valid or not; and as to how much, if anything, is due upon said debt, although he has made diligent inquiry in regard thereto, and he desires to contest the same, and that, if the mortgage is valid and the debt such as the mortgage claims it to be, either this receiver may be able to redeem said property from other assets of the estate, or can sell said property to a better advantage so as to realize more for the creditors of the Independent Lumber Company, if said claim is settled in the receivership proceedings aforesaid, than if the property is sold in the above summary manner.

"(5) That affiant notified the attorney of the said Beavers, who had charge of the matter for him, and notified in writing the sheriff, Edward Cudihee, immediately before the institution of these proceedings to sell said property, of the claim and interest of this receiver therein, and demanded of the sheriff not to take said property; but he, the said sheriff, against the will of the receiver, took possession of said property, and unless restrained herein will sell said property, and the same will be scattered and impossible to trace.

"Wherefore the plaintiff prays that the defendant Averill Beavers, and the defendant sheriff, and all of his deputies and agents, be enjoined from foreclosing his mortgage or selling the property aforesaid in the manner aforesaid, but that he be required to present his claim, and have his rights adjudicated in the receivership proceedings in the above case; and that the said defendant show cause before this court on Monday morning, May 18, 1903, at 9:30 o'clock, why an injunction should not issue in the premises pending suit, and that in the meanwhile they, the defendants, and their agents, be restrained in the premises. And for such other and further relief as to the court may seem meet."

On the filing of this complaint, a temporary restraining order was issued without notice, citing appellants to appear on May 18, 1903, and show cause why an injunction *pendente lite* should not issue. Said appellants appeared at the time fixed, and demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was denied, and the cause continued until May 22, 1903, for a further showing. On this latter date affidavits were filed, both by appellants and respondent, and a hearing had thereon. On June 1, 1903, appellants filed an answer denying all the allegations of the complaint, and, as an affirmative defense, set up the facts substantially as stated in the beginning of this opinion. Subsequently, on June 9,

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1903, without further evidence than that contained in the affidavits above referred to, the court made the following order, omitting the formal parts:

"This cause coming on now to be heard upon the order of this court requiring the defendants to show cause why they should not be enjoined from an attempted foreclosure by notice of an alleged chattel mortgage upon certain personal property set out in plaintiff's application, and defendant having appeared in person and by his attorney, Mr. James A. Snoddy, plaintiff appearing by his attorneys, Peters & Powell, and the court having heard and considered the facts presented by affidavits on the part of both parties and the arguments of counsel, and the court finding therefrom that the Independent Lumber Company, an insolvent corporation—now in the course of administration—has an interest in and title to said personal property, and that it would be a detriment and loss to the Independent Lumber Company, and its creditors, to permit the foreclosure or sale of said property under the summary process of sale by sheriff on notice now attempted by the defendants, wherein the rights of the parties cannot be tried out under process of law;

"Now, it is ordered and adjudged, that the defendant, Averill Beavers, his agents and all claiming under him, and the sheriff, Edward Cudihee, his deputies and all those acting under him, be and they are here enjoined from further proceedings in the attempted sale by notice of said personal property named in the plaintiff's complaint, and being to-wit: four horses and a wagon and harness, all or any part of it, purporting to be that included in an alleged chattel mortgage from George E. King to Eva Stevenson, and assigned to the said Averill Beavers, or alleged to be, which said sheriff had advertised to be sold on May 18th, 1903, and the said parties, and all of them, are also enjoined from in any manner interfering with the possession of said receiver, Gilbert P. Kidder, in said property, and it is further ordered and adjudged that the plaintiff have judgment herein against the defendant Averill Beavers for his costs herein to be taxed."

From this order the defendants appeal.

Three assignments of error are made as follows: that the court erred, (1) in issuing the temporary order, (2) in overruling the demurrer, and (3) in entering final judgment. The questions presented by the first two assignments go to the sufficiency of the complaint. There is no allegation in the complaint to show that the Independent Lumber Company was the owner of the property described, at the time the mortgage was given thereon; nor is there any allegation of any other facts showing that the mortgagee had no right to foreclose his mortgage or that the amount claimed was not justly due thereon. It is true, plaintiff alleges that he desires to contest the mortgage for the reason that, after diligent inquiry of the officers and stockholders of the Independent Lumber Company, he is unable to state whether or not the mortgage and debt are valid, and how much is due thereon. Chapter 1 of Title 33, Bal. Code, provides for the foreclosure of chattel mortgages by notice and sale, as appellant was doing. § 5876 is as follows:

"The right of the mortgagee to foreclose, as well as the amount claimed to be due, may be contested by any person interested in so doing, and the proceedings may be transferred to the superior court, for which purpose an injunction may issue if necessary."

But this section does not mean that any person interested may simply say to the superior court that he desires to contest such mortgage because the mortgaged property is largely in excess of the mortgage debt, and he does not know that the mortgage is valid, or how much is due upon the debt, and is unable to find out about these facts, and thereupon the proceedings must be transferred to the superior court. The purpose of the statute is to prevent unjust foreclosures by notice and sale, where any person interested sets up the facts showing that the mortgagee has no

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right to foreclose, or that the amount claimed is not due or owing upon the debt. *West Coast Grocery Co. v. Stinson*, 13 Wash. 255, 43 Pac. 35. Tested by this rule the complaint was insufficient.

It is claimed by respondent that the appellant was not authorized to maintain the proceedings to foreclose his chattel mortgage by suit or attachment against the receiver, without first obtaining leave to do so from the court appointing him; citing *Brown v. Rauch*, 1 Wash. 497, 20 Pac. 785; *Meeker v. Sprague*, 5 Wash. 242, 31 Pac. 628; *Blake v. Savings Bank*, 12 Wash. 619, 41 Pac. 909. This position is, no doubt, correct where the receiver is in actual or constructive possession of the mortgaged property. In such cases his possession may not be disturbed without leave of the court. But there is no allegation in the complaint that the receiver was in possession of the property at the time the sheriff took the same, or that the Independent Lumber Company ever had possession thereof. It is true, there is an allegation that the Independent Lumber Company is the owner of the property, but it does not follow from this allegation that that company, or the receiver, was in possession thereof, either actually or constructively, at the time the sheriff seized it. It may be true that the Independent Lumber Company was the owner, and still the receiver would not be entitled to the possession thereof. This court in *State ex rel. Arthur Mach. Co. v. Superior Court*, 7 Wash. 77, 34 Pac. 430; *State ex rel. Hunt v. Superior Court*, 8 Wash. 210, 35 Pac. 1087, 25 L. R. A. 354; and *Cherry v. Western Wash. I. E. Co.*, 11 Wash. 586, 40 Pac. 136, held that a receiver was not authorized to take possession of the property of an insolvent corporation where possession thereof had been taken under attachment or exe-

cution prior to the appointment of a receiver. It was said in the last named case:

"It is not alleged that either the sheriff or appellant took any property from the possession of the receiver which was rightfully in his possession, or in any way impeded or hindered him in the discharge of his duties; . . ."

It was necessary to allege these facts before the court could interfere, upon the ground claimed, with the sale of the property by the mortgagee. These facts not being alleged in the complaint, it was not sufficient to support an order upon such ground. The complaint was not sufficient to support the order upon either ground claimed by respondent, and the lower court therefore erred in overruling the demurrer.

It appears from the affidavits filed at the hearing of the application for the restraining order, that the plaintiff's mortgage is a valid lien upon the property therein described, except two horses and a wagon not seized by the sheriff, and that the amount claimed was long past due; that, subsequent to making the mortgages, the mortgagor sold a part of the property therein described to the Independent Lumber Company; and that, thereafter, certain of the officers of the Lumber Company sold such property to third persons, who were in possession thereof at the time the sheriff seized the same under the chattel mortgage foreclosure proceedings. It is not claimed by the respondent that the Lumber Company was in possession of any part of the property at the time he was appointed, or that he had ever taken charge of any of the property described by the mortgage. The receiver, however, claims that the sales made by the officers of the Lumber Company were fraudulent and void, and that therefore the creditors of the Lumber Company still have an interest in the property. This claim being established.

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it does not follow that the court may make an order such as the one appealed from. This fact would show that the receiver had an *interest* in the property, and therefore under the statute, § 5876, *supra*, he might contest the right of the mortgagee to foreclose, as well as the amount claimed to be due, the same as any other individual might do. His appointment as receiver of the Lumber Company gave him possession of all the property of the corporation which it had at the time of the appointment. He took only such rights as the corporation had at that time. Beach on Receivers, § 2818 (Alderson's ed.); High on Receivers, § 138 (3d ed.); *Cherry v. Western Wash. I. E. Co.*, *supra*.

Since the corporation was neither in the actual nor constructive possession of the property in dispute, the receiver, by his appointment, took no greater right than a right to acquire possession in one of the methods which might have been pursued by the corporation itself, had a receiver not been appointed. This appellant was a stranger to the action in which the receiver was appointed; he was therefore privileged to seize any property described in his mortgage, not in the possession of the receiver. The remedy of the receiver, under the facts shown, was the same as that of any individual interested in the foreclosure. Before he could contest the foreclosure he must allege the facts, as hereinbefore stated.

Upon the showing made, there was no ground for a restraining order. The judgment and order appealed from are therefore reversed, and the cause remanded with instructions to the lower court to sustain the demurrer, with leave to the respondent to amend his complaint within a reasonable time to be fixed, if he desires to do so. Appellants to recover costs.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4717. Decided December 29, 1902.]

SEWALL P. STONE *et al.*, Respondents, v. CITY OF
SEATTLE, Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—EVIDENCE AS TO OTHER SIDEWALKS. In an action for personal injuries caused by stepping into a small hole at the edge of the sidewalk, testimony on the part of the city that the sidewalk was built upon the same plan and that the opening was the same as generally adopted in many other sidewalks throughout the city, is inadmissible.

SAME. Neither could the city prove that the sidewalk was like the sidewalks in many other cities.

SAME—NECESSITY OF HOLE IN SIDEWALK. Neither could the city prove that the opening was necessary for the purpose of disposing of surface water, since it is a matter of common knowledge that surface water may be otherwise disposed of.

DAMAGES—EXPERT TESTIMONY—MEDICAL WORKS—CORRECTNESS OF STATEMENT NOT PERTAINING TO MEDICAL SCIENCE—REFLECTION ON HONESTY. In an action for personal injuries it is proper to exclude the testimony of a physician that a medical work correctly states that patients with traumatic neurosis, injured in railroad accidents, usually recover after the settlement of pending litigation, as it does not pertain to medical science, and is merely a reflection upon individual honesty.

DAMAGES—PERSONAL INJURIES—VERDICT—WHEN EXCESSIVE. A verdict for \$9,000 for personal injuries through stepping into a hole in the sidewalk, sustained by a woman fifty-five years of age, engaged in nursing and general housework, held excessive and reduced to the sum of \$6,000.

Appeal from a judgment of the superior court for King county, Bell, J., entered December 6, 1902, upon the verdict of a jury rendered in favor of the plaintiff for the sum of \$9,000 for personal injuries. Affirmed upon the condition of remitting \$3,000.

¹Reported in 74 Pac. 808.

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Citations of Counsel.

M. Gilliam and William Parmerlee, for appellant, contended *inter alia*, that it was competent to show a general or common method of constructing the walks as bearing on defendant's negligence, and the proportionate obligation of plaintiff to use special care. *Heiss v. Lancaster*, 203 Pa. St. 260, 52 Atl. 201; *Benedict v. Union Ag. Soc.*, 74 Vt. 91, 52 Atl. 110; *Birmingham etc. R. Co. v. Alexander*, 93 Ala. 133, 9 South. 925; *Crane v. Missouri Pac. R. Co.*, 87 Mo. 588; *Shea v. Lowell*, 90 Mass. 136; *Augusta v. Hafers*, 61 Ga. 48, 34 Am. Rep. 95; *Evans v. Keystone Gas Co.*, 148 N. Y. 112, 42 N. E. 513, 30 L. R. A. 651. The city had to provide for the surface water. *Los Angeles Cem. Ass'n v. Los Angeles*, 103 Cal. 461, 37 Pac. 375; *Haynes v. Burlington*, 38 Vt. 350; *Sprague v. Worcester*, 13 Gray (Mass.) 193; *McClure v. Red Wing*, 28 Minn. 186, 9 N. W. 767. The verdict in this case was excessive. *Chicago v. Langlass*, 52 Ill. 256, 4 Am. Rep. 603; *Kennedy v. St. Paul City R. Co.*, 59 Minn. 45, 60 N. W. 810; *Johnson v. St. Paul City R. Co.*, 67 Minn. 260, 69 N. W. 900; *Bronson v. Forty-Second St. etc. R. Co.*, 67 Hun 649, 21 N. Y. Supp. 695; *Bell v. Globe Lumber Co.*, 107 La. An. 725, 31 South. 994; *Budge v. Morgan's etc. Co.*, 108 La. An. 349, 32 South. 535; *Peri v. New York Cent. R. Co.*, 87 Hun 499, 34 N. Y. Supp. 1009; *Illinois Cent. R. Co. v. Welch*, 52 Ill. 183, 4 Am. Rep. 593; *Pfeffer v. Buffalo R. Co.*, 4 Misc. (N. Y.) 465, 24 N. Y. Supp. 490; *Vowell v. Issaquah Coal Co.*, 31 Wash. 103, 71 Pac. 725; *Torske v. Commonwealth L. Co.*, 86 Minn. 276, 90 N. W. 532. See the following cases of "neuresthenia" where verdicts for \$10,000 in each instance were reduced to \$4,000. *Becker v. Albany R.*, 35 N. Y. App. Div. 46, 54 N. Y. Supp. 395; *Lockwood v. R. Co.* (Com. Pl.), 7 N. Y. Supp. 663.

Noon & Noon and *John F. Dore*, for respondents. The customary negligence of the city is no defense. *Koester v. City*, 34 Iowa 41; *Propsom v. Leatham*, 80 Wis. 608, 50 N. W. 586; *Johnson v. First Nat. Bank*, 79 Wis. 414, 48 N. W. 712; *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Pennsylvania R. Co. v. Aiken*, 130 Pa. St. 380, 18 Atl. 619; *Colf v. Chicago etc. R. Co.*, 87 Wis. 273, 58 N. W. 408; *Rumpel v. Oregon etc. R. Co.* (Idaho), 35 Pac. 700, 22 L. R. A. 725; *Iluwaco R. etc. Co. v. Hedrick*, 1 Wash. 446, 25 Pac. 335, 22 Am. St. 169; *Rooney v. Sewall etc. Co.*, 161 Mass. 153, 36 N. E. 789; *Ford v. Mt. Tom etc. Co.*, 172 Mass. 544, 52 N. E. 1065, 48 L. R. A. 96; *Cent. R. Co. v. De Bray*, 71 Ga. 406; *Gulf etc. R. Co. v. Evanisch*, 61 Tex. 3. In the following cases it has been held that evidence as to usual methods in other towns is inadmissible. *Kidder v. Dunstable*, 11 Gray (Mass.) 342; *Hinckley v. Barnstable*, 109 Mass. 126; *Schoonmaker v. Wilbraham*, 110 Mass. 134; *Marvin v. New Bedford*, 158 Mass. 464, 33 N. E. 605; *Littleton v. Richardson*, 34 N. H. 179, 66 Am. Dec. 759; *Hubbard v. Concord*, 35 N. H. 52, 69 Am. Dec. 520; *Malloy v. Township of Walker*, 77 Mich. 448, 43 N. W. 1012, 6 L. R. A. 695; *Koester v. Ottumwa*, 34 Iowa 41; *Champaign v. Patterson*, 50 Ill. 61; *Kenworthy v. Ironton*, 41 Wis. 647; *Perkins v. Fond du Lac*, 34 Wis. 435; *Temperance Hall Asso. v. Giles*, 33 N. J. L. 520; *Tripp v. Lyman*, 37 Me. 250; *Bauer v. Indianapolis*, 99 Ind. 56. The courts are not justified in disturbing a verdict for unliquidated damages as excessive in amount unless it appears that it was awarded through passion or prejudice. *McNamara v. King*, 7 Ill. (2 Gil.) 432; *Aldrich v. Palmer*, 24 Cal. 513; *Wheaton v. North Beach etc. R. Co.*, 36 Cal. 590; *Wilson v. Fitch*, 41 Cal. 363; Hayne, New Trials and Appeals, § 95; *Lake Erie etc. R.*

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Co. v. Acres, 108 Ind. 548, 9 N. E. 453. The damages in this case were not excessive. *Ohio etc. R. Co. v. Judy*, 120 Ind. 397, 22 N. E. 252; *Greene v. Minneapolis etc. R. Co.*, 31 Minn. 248, 17 N. W. 378; *Harker v. Burlington etc. R. Co.*, 88 Iowa 409, 55 N. W. 316; *Kansas City v. Manning*, 50 Kan. 373, 31 Pac. 1104; *Hinton v. Cream City R. Co.*, 65 Wis. 323, 27 N. W. 147; *Bitner v. Utah etc. R. Co.*, 4 Utah 502, 11 Pac. 620; *Hanlon v. Missouri Pac. R. Co.*, 104 Mo. 381, 16 S. W. 233; *Rush v. Spokane etc. R. Co.*, 23 Wash. 501, 63 Pac. 500; *Uren v. Golden Tun. Min. Co.*, 24 Wash. 261, 64 Pac. 174; *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847; *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383; *Smith v. Spokane*, 16 Wash. 403, 47 Pac. 888.

DUNBAR, J.—This action was instituted by the respondents Sewall P. Stone and Mary E. Stone, his wife, for damages for personal injuries received by the wife on the 4th day of October, 1900, by reason of her stepping into a hole in one of the streets of the city of Seattle. At the junction of Kilbourne and Bowman avenues, the outer plank of the cross walk was some ten inches short, leaving an opening which was at that time some four or five inches deep, and which was of sufficient size for a person to step into. The accident occurred at night. Near this opening stood a large electric light pole, from which an electric arc light was suspended in such a manner as to cast the shadow of the pole over the opening. The case was tried to a jury, a verdict of \$9,000 was returned, and judgment entered for that amount, from which judgment this appeal is taken.

This is the second time that this case appears in this court. At the first trial, nonsuit was granted on the ground that there was a total failure of proof as to any

negligence on the part of the city. Thereafter respondents moved for a new trial. That motion was also granted and a new trial ordered, and from the order granting a new trial, the city appealed. This court sustained the trial court, and the cause was remanded for trial (30 Wash. 65, 70 Pac. 249), which was had, and resulted in the judgment aforesaid.

It is alleged that the court erred in sustaining respondents' objection to competent evidence offered by appellant. The offer by the city attorney was as follows:

"We offer to prove that all the sidewalks in the city—in this part of the city especially—built along about that time, such as a sidewalk in this case, were built upon the same plan of construction as this sidewalk was built, and that this sidewalk and this opening is no different than hundreds of other sidewalks and openings in the city built upon that plan of construction."

This testimony was objected to, and the objection we think was properly sustained. In addition to the fact that the city could not avoid liability by proving that it had systematically been guilty of negligence in the construction of its walks and streets, this question, it seems to us, was determined upon a former trial of this case, where it was decided that the city could not escape liability for injury from a defective sidewalk because the defect was part of the original plan of construction.

The next offer was to prove by a witness that he had visited many of the large cities of the United States, and was familiar with the plans and construction of sidewalks such as the sidewalk in question, and that in those places they were constructed like the sidewalk in question. We think that objection to this testimony was also properly sustained. The only real question at issue here, on this branch of the case, was whether the city was guilty of

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maintaining the sidewalk in a negligent manner, and its liability could in no wise be affected by the fact that other cities might, or might not, be guilty of the same negligence.

The appellant also offered to prove that it was necessary to have this opening in the sidewalk for the purpose of disposing of surface water, and that the opening was for the purpose of cleaning out the drain and keeping it open. We think objection to this testimony was also properly sustained. This court has uniformly announced in its decisions that the test of the liability of a city is whether or not it constructs and maintains its walks in a reasonably safe manner. This is a duty it owes to pedestrians, who have a right to travel on the walks. Besides, it is a matter of such common and universal knowledge that surface water could be disposed of by grates and other small openings which would be harmless, that it was not proper to admit testimony which would simply tend to confuse the minds of the jurors, and lead them from the pertinent questions in issue.

It is also insisted that the court erred in sustaining objection to questions asked Dr. Faulk on cross-examination. Dr. Faulk had testified as a medical expert on behalf of respondents, and the following colloquy occurred:

"Q. I will ask you now if you are acquainted with the work on medicine known as the 'Practice of Medicine,' by Osler. A. Yes sir. Q. Do you consider it one of the standard works? A. Yes sir. Q. Now, if Osler lays down the proposition that 'A majority of patients with traumatic neurosis recover in railway cases. So long as litigation is pending and the patient is in the hands of lawyers the symptoms usually persist. Settlement is often the starting point of a speedy and perfect recovery with a full return to health, after presenting the most aggravating symptoms with complete disability of three to five years' duration.' I will ask you if that is a correct an-

nouncement of medical science relating to this disease that you have described."

It would seem plain that the only effect that a statement of this kind could have on a jury would be to prejudice it against claims of this character. Even if it were pertinent, it is but hearsay testimony, and on a subject entirely disconnected with the matters at issue, and does not pertain in any way to the medical profession or science of medicine, but is simply a reflection upon the honesty of individuals generally who meet with accidents caused by railroads.

We are unable to discover any prejudicial error in the instructions of the court, or in its refusal to instruct. The instructions given fairly stated the law and embraced all the law which should have been given in the cause. Nor do we think that the alleged action of the court in his demeanor towards the city attorney was of such a serious nature as would warrant a reversal of this cause.

We are satisfied, however, from an examination of the whole record, that the jury was not warranted in decreeing this respondent damages in the sum of \$9,000. She was a woman fifty-five years old at the time of the accident, engaged in nursing and housekeeping. What was said by this court in *Vowell v. Issaquah Coal Co.*, 31 Wash. 103, 71 Pac. 725, might be substantially repeated here; viz., that the earning capacity of men and women decreases after middle life, and usually decreases very rapidly. Here, as there, this woman was at the time of life when her physical vigor was on the wane. No other means of obtaining a livelihood or making money was attributed to her than as a nurse and housekeeper; and considering all the testimony in the case that seems to us to bear the impress of reason, we think \$6,000 would have been a liberal allowance for the jury to have awarded.

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Syllabus.

Instead, however, of reversing the cause for this error, and imposing the costs of a new trial upon both parties, the judgment of the court will be that, if the respondents, within twenty days from the filing of this opinion, remit from the judgment obtained the amount of \$3,000, the judgment as so amended will be affirmed. Otherwise the judgment will be reversed, and a new trial granted.

FULLERTON, C. J., and HADLEY, MOUNT, and ANDERS, JJ., concur.

[No. 4776. Decided December 29, 1903.]

AUGUSTA DUBCICH, *Respondent*, v. GRAND LODGE ANCIENT ORDER OF UNITED WORKMEN OF THE STATE OF WASHINGTON. *Appellant*.¹

APPEAL—REVIEW—MOTION FOR NEW TRIAL—NECESSITY. A motion for a new trial is not necessary to secure a review of rulings made by the trial court during the progress of the trial, and Code of 1881, § 450, dispensing with the necessity of motions for new trials is not essential to the rule, in view of Bal. Code, § 6520, authorizing the review of intermediate orders or determinations on appeal from any final judgment.

WITNESSES—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT. Testimony of a physician as to the physical condition of a patient treated by him is properly excluded as privileged, where the exclusion extends only to disclosures while the professional relation existed.

BENEFICIAL SOCIETIES—ACTION ON POLICY—FRAUD IN OBTAINING MEMBERSHIP—FALSE APPLICATION—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action upon a beneficiary certificate in a mutual society where the defense is that the policy was void on account of false statements as to the deceased member's physical condition, and as to his rejection on a former application for life insurance, a nonsuit is properly refused where the only proof of fraud is evidence of contrary statements by the deceased upon a

¹Reported in 74 Pac. 832.

33	651
34	193
35	67
35	108
33	651
40	696

former application to a different lodge of the same order, which was rejected, and where the proof further shows that deceased understood and spoke English imperfectly, and did not himself write the former answers, and may have misapprehended their import.

SAME. It is also a question for the jury whether the defendant did not have knowledge, or means of knowledge, of the former answers, where it appears that both applications were forwarded by the local lodges to the same central authority, and were in its possession for a year and a half.

BENEFICIAL SOCIETIES—MEMBERSHIP—EXPULSION—RULES OF SOCIETY—CONSTRUCTION. In an action on a mutual benefit certificate defended on the ground that the member had been expelled for false statements in securing membership, the rules of the society introduced in evidence are to be construed by the court to determine whether they conferred jurisdiction to expel upon mailed notice at a time when the member was insane.

SAME—JURISDICTION OF THE COURTS. In such a case the courts may inquire into the proceedings of the society expelling a member, to determine whether the procedure was fairly conducted under the laws of the society.

SAME—NOTICE OF HEARING—SUFFICIENCY WHERE MEMBER IS UNDER DISABILITY. A mutual benefit society acquires no jurisdiction to enter an order of expulsion on the ground of fraud in securing membership, where at the time of mailing the notice of the hearing, the member is insane, and in a hospital incapable of being present, especially when, before the hearing, knowledge was brought to the society that he was unable to be present and insane; unless, at least, it clearly and unmistakably appears that the laws of the society authorize such a notice.

SAME. A notice by mail of the hearing of charges of fraud in procuring membership in a mutual benefit society, upon which a member is to be expelled, do not stand upon the same footing as a charge of nonpayment of dues, and is not authorized by the laws of a society that do not expressly provide for a mailed notice upon such a charge.

SAME—ACTION ON POLICY—DEFENSES—UNAUTHORIZED EXPULSION—REMEDY OF BENEFICIARY. In an action on a mutual benefit certificate, where the society relies upon an expulsion which was entered against the deceased member while insane, and without jurisdiction, and his death occurs before he can take an appeal, and the beneficiary has no right of appeal, and she offers arbitra-

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tion (her only remedy in the society), which is refused, an action in the courts is maintainable and a challenge to the sufficiency of the evidence is properly overruled.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 13, 1903, upon the verdict of a jury rendered in favor of the plaintiff in an action upon a life policy in a mutual benefit society. Affirmed.

Benson & Hall (J. W. Kinsley, of counsel), for appellant.

Hastings & Steadman, for respondent.

HADLEY, J.—Appellant is the Grand Lodge in the state of Washington of the fraternal beneficiary society known as, "Ancient Order of United Workmen." On the 6th day of April, 1900, the authorized officials of appellant issued a beneficiary certificate wherein it is recited that Stephen Dubcich is a member of Columbia Lodge No. 2, of said order, located at Seattle, Washington, and is entitled to all the rights and privileges of membership, and to designate the beneficiary to whom the sum of \$2,000 of the beneficiary fund of the order shall, at his death, be paid. It is also recited that said Stephen Dubcich has designated, as such beneficiary, Augusta Dubcich, bearing to him the relation of wife. The respondent here is the beneficiary named in said certificate. In January, 1902, said Stephen Dubcich died. The respondent, as said beneficiary, demanded payment under said certificate, which was refused, and this action was brought to recover the amount named therein.

The defense is that the deceased made false representations to appellant at the time he made application for membership, on account of which he was expelled from the order, and that respondent is therefore not entitled to share

in the beneficiary fund. The defense, as urged here, is presented upon two theories: (1) that by reason of the alleged false representations the contract with deceased was void *ab initio*, and (2) that by reason of his expulsion the contract was terminated. The alleged ground of expulsion, however, is based upon the same facts which are urged as making the contract void from the beginning. Those alleged facts are that the deceased stated in his written application for membership, in answer to questions, that he had never been afflicted with frequent headaches or syphilis, and that he had never before applied for life insurance and been rejected; whereas, it is alleged that he had formerly applied for membership in Seattle Lodge No. 60 of the same order, and had answered said questions as to afflictions in the affirmative. The cause was tried before a jury, and a verdict was returned in favor of respondent for \$2,000, with accrued interest. Judgment was entered upon the verdict, and this appeal is from the judgment.

Respondent moves to dismiss the appeal on the ground that, as no motion for new trial was made, the judgment cannot, for that reason, be reviewed here. The errors specifically assigned, however, all involve rulings made by the trial court during the progress of the trial. The office of the motion for new trial, in its necessary relation to the appeal, is to give the trial court opportunity to pass upon questions not before submitted for its ruling, such as misconduct of the jury, newly discovered evidence, excessive damages, error in the assessment of the amount of recovery, and similar questions. The motion seems to serve no necessary purpose, as far as concerns the review on appeal of questions once submitted to, and decided by, the trial court. It is true, if such questions are raised a second time, under the motion for new trial, the trial court

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may consider them, and may review its own rulings made at the trial to the extent of correcting them by granting a new trial. But such review by the trial court is not necessary in order that questions once actually decided by it in the cause may be considered on appeal. This court in effect so held in *Johnson v. Maxwell*, 2 Wash. 482, 27 Pac. 1071, and *Kennedy v. Derrickson*, 5 Wash. 289, 31 Pac. 766. In the last named case the court said:

“The only effect which the failure to make such motion can have upon the proceedings in this court is to limit the questions which may be properly presented here.”

It is contended that those decisions were based upon § 450 of the Code of 1881, which provides that “the supreme court may review and reverse on appeal or writ of error any judgment or order of the district court, although no motion for a new trial was made in such court;” and it is urged that no such provision now exists in our statutes. Our attention has, however, not been called to any existing statute which affirmatively provides that the motion is necessary as a preliminary to the review on appeal of questions passed upon during the progress of the trial. We think, in the absence of such a statute, that the provisions of § 6520, Bal. Code, are broad enough to authorize the review of such questions here without a motion for new trial. We refer particularly to the following in said section:

“Upon an appeal from a judgment, the supreme court may review any intermediate order or determination of the court below which involves the merits and materially affects the judgment appearing upon the record sent up from the superior court.”

The motion to dismiss the appeal is denied.

It is assigned that the court erred in excluding the testimony of a physician as to the physical condition of the

deceased at the time he was treated by the witness. Objection was made to the questions on the ground that they necessarily called for the disclosure of privileged communication between physician and patient. We think the objection was properly sustained on that ground. The court, in its rulings upon that subject, discriminated between information acquired when the relation of physician and patient existed, and that which was otherwise acquired. The exclusion extended only to the disclosure of information acquired while the professional relation existed. We think the court did not err in that particular.

It is next assigned that the court erred in overruling appellant's challenge to the sufficiency of the evidence. As before intimated, the theory of the appellant, as urged on appeal, is twofold; viz., that the contract was void *ab initio* for fraud, and, if not void, that it was terminated by the expulsion of the deceased from the order. The burden of appellant's brief is, however, devoted to the theory that the expulsion of the deceased is the thing which determines against respondent's recovery. The brief contains the following statement: "Under the pleadings in this case it is admitted that Dubcich was a member in good standing up to January, 1902." Again, it is stated in the brief as follows:

"The penalties of an old line company run against the policy in the hands of innocent women and children, while all the penalties in the A. O. U. W. run against the member. For instance, in this case, the claim of the defendant is that the membership on which this claim is founded was fraudulently obtained. The penalty for that offense is not, as in an old liner, that the certificate shall be void, but that the member so offending shall be expelled."

It is thus conceded in appellant's brief that the deceased was an actual member in good standing until,

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it is claimed, he was expelled; and further, that the certificate was not void from the beginning, but was extinguished by the subsequent act of expulsion. In view of these concessions in the brief, the mere suggestion, at its close, that the certificate was void *ab initio* is out of harmony with the argument in the great body of the brief. The latter proposition is merely suggested, and is not discussed to any extent, or supported by the citation of authorities. We shall, however, discuss both propositions in their relation to the case at bar.

Assuming for the sake of the argument, but not deciding, that a certificate would be rendered void *ab initio* by reason of false statements made in the application for membership, what is the situation under the evidence in this case? We do not think the evidence was such that the court should have ruled, on the challenge to the sufficiency thereof, that the statements in the application for membership had been shown to be false. That was a fact for the jury to determine. The only really tangible evidence tending to impeach the truth of the statements in the application was testimony to the effect that, in a former application to another lodge of the same order, the deceased had answered similar questions in the affirmative, which were negatively answered in the one upon which his membership was initiated. It was for the jury to say whether the former answers were made under a misapprehension of the import of the questions. It appeared in the evidence that the deceased was of Austrian nationality, and spoke and understood the English language imperfectly. It also appeared that, although the application was signed by the deceased, yet the answers to the questions were not written by him, but by the examining physician. The question as to whether he had ever applied for life insurance and been rejected, which was negatively

answered in the last application, was subject to the following considerations: It was possible for the applicant to have understood the question to relate to an application for mere life insurance, submitted to a company dealing with nothing else, and he may not have regarded his former application as one for life insurance strictly, but as one for membership in a fraternal order. These circumstances were all for the jury to consider in determining whether the statements in the last application were true or false. The truth or falsity of the statements in the last application was what was to be determined, and, if they were in fact true, the former statements were not material.

Another element is also involved. Both of these applications were forwarded by the local lodges to the same central authority of the Grand Lodge, and both passed upon by that authority. It therefore became a question for the jury whether the appellant actually knew, or by the exercise of reasonable diligence should have known, the contents of the first application, when it issued the certificate in question. On the challenge to the sufficiency of the evidence, the court was therefore confronted with the principle that, if appellant knew, or by the exercise of reasonable diligence should have known, of the former statements, when it issued the certificate, then it should be deemed to have waived the question of misrepresentations. It had also appeared that, for more than a year and a half after the statements of the last application were in appellant's possession and notwithstanding the contents of the former, which were also in its possession and under its control, appellant received and acknowledged the deceased as a regular member of the order in good standing, and also regularly received from him and appropriated the collectible dues. For these reasons we

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think the court did not err in overruling the challenge to the sufficiency of the evidence, even when considered upon the theory that fraud would have made the contract void from the beginning. Even under that theory, it was for the jury to find as a fact whether fraud existed or whether the misrepresentations, if any were made, had been waived.

We come now to consider the other feature involved under the challenge to the evidence, and to the discussion of which appellant's brief is chiefly directed; viz., was the evidence such that the court should have ruled that the deceased had been expelled from the order? Some time toward the latter part of the year 1901, the deceased, Dubcich, received a severe injury upon the skull. A surgical operation followed, and there was evidence to the effect that he was thereby seriously incapacitated mentally. It was alleged in the complaint, and not denied by the answer, that on the 14th day of January, 1902, he was adjudged to be insane by the superior court of King county, and was committed to the asylum for the insane at Steilacoom, Washington. It is alleged in the answer that on December 14, 1901, the deceased was duly and personally, and by mail, notified of the charges against him, and was thereby required to appear before the lodge on December 20, 1901, to answer the same. Both personal notice and notice by mail are alleged, but at the trial there was no evidence of personal service, and notice by mail was relied upon as being authorized by the laws of the order, to which, it was urged, the charged member had subscribed, and by which he was therefore bound.

The evidence shows—for there is none to the contrary—that the mailed notice was received by the respondent, the wife of the charged member; that the latter was then in Providence Hospital, at Seattle, and was in such condition

mentally that he could not comprehend the meaning of any notice, and did not know that he was charged with any offense. An application was made to the lodge by respondent, in behalf of her husband, for postponement of the hearing upon the charges on account of his physical and mental condition. His alleged incapacity, both mental and physical, was stated in the application for continuance. The lodge, however, disregarded the application, and proceeded to consider the charges, which resulted in what is claimed to have been an expulsion. The respondent afterwards received a mailed notice of the alleged expulsion on the very day of her husband's death, he being dead at the time.

Aside from the admitted adjudication of insanity, soon after the time the charges were preferred, it was testified at the trial, and not disputed by other testimony, that the deceased was in fact insane when the charges were preferred. A personal notice of the charges was alleged, but not proven; and, even if a mailed notice is ordinarily sufficient under the rules of the order, yet we do not think such a rule could in reason have been intended to apply when the alleged offender is insane. An important contractual right and individual character for integrity and morality were involved in the charges, and in such event courts of justice will not proceed against an insane person, when insanity is suggested, without seeing that he is duly represented by competent authority to protect his rights, and that such representative is duly notified. The laws of the order on the subject of notice and trials were introduced in evidence, and it was for the court to construe them and determine whether they conferred jurisdiction to try the accused under the notice which was shown. Niblack, Benefit Soc. and Accident Ins., p. 118;

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Osceola Tribe of Red Men v. Rost, 15 Md. 295; *Hutchinson v. Lawrence*, 67 How. Prac. 38.

Appellant contends that courts will not interfere with the methods of societies in the expulsion of their members. Such is probably the correct rule when the procedure appears to have been fairly conducted in accordance with the rules of the society. Appellant cites *Bachman v. New Yorker etc. Bund*, 64 How. Prac. 442. That case, however, recognizes the rule that courts will inquire into the regularity of the proceedings to ascertain if they have been fairly conducted in accordance with the society's rules, and announces that, ". . . when the latter fact is once judicially determined in a legal or equitable controversy between the parties, in which an issue involving the question has been distinctly raised, the door to further inquiry upon that subject should be closed, . . ." Thus judicial inquiry into the fairness of the proceedings is fully recognized. See also: Niblack, *Benefit Soc. & Accident Ins.*, p. 118; *Osceola Tribe of Red Men v. Rost*, *supra*; *Hutchinson v. Lawrence*, *supra*; *Lazensky v. Supreme Lodge Knights of Honor*, 31 Fed. 592; *Woodmen of the World v. Gilliland* (Okla.), 67 Pac. 485.

Several of the cases cited by appellant relate to mailed notices for nonpayment of dues, which involve questions very different from a proceeding to try one upon charges of immorality and dishonesty, for the purpose of expelling him from membership in an honorable society. The obligation to pay dues is already known to the member, and involves the duty to be prompt in looking after them. The case of *Hawkshaw v. Supreme Lodge Knights of Honor*, 29 Fed. 970, is cited as involving a case of insanity. It appeared that the default in payment of dues was on account of insanity, and it was held that such was not an excuse for nonpayment. The duty to pay dues existed in

any event under the contract, and it could not be kept alive without payment, even though the member was insane. The principle there decided was altogether different from the one involved here, where the member had regularly paid all dues under his contract, which dues had been accepted. He had therefore kept all conditions of his contract after it was made, and the procedure against him was for the purpose of avoiding the contract, which he had faithfully kept as far as payments were concerned.

The case of *Pfeiffer v. Weishaupt* (N. Y. Com. Pleas), 13 Daly 161, seems to be more directly in point with appellant's contention that, even though the adjudged party may be insane, he may be proceeded against under expulsoy charges, when he has been summoned. The opinion is brief and does not enlarge upon the subject in hand. It simply holds that a lodge may proceed against one who has not been adjudged a lunatic. Personal service of notice was, however, made in the case, which was not done here; and, as we have already intimated, it became a question for the court whether a simple mailed notice met the requirements of the case, under the laws of appellant society, when such serious charges were involved, when the accused was insane, and especially when, before the hearing upon the charges, knowledge was brought to the charging body that the accused was claimed to be not only physically unable to be present, but also positively insane. The actual adjudication of insanity followed just one month after the alleged notice was mailed, but the testimony in effect showed that his mental disqualification was as marked on the former date as on the latter.

In the case of *United Workmen v. Zuhlke*, 129 Ill. 298. 21 N. E. 789, the same defense was made which is interposed here, that the deceased had made false statements in his application for membership, and that he had been

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expelled. Expulsion was relied upon to defeat recovery. It appeared that the party was insane at the time of the lodge trial. He actually appeared before the lodge in person, but it was held that he was incapable of consenting to the proceedings, and recovery was awarded. It is true, sufficient notice had not appeared to confer jurisdiction, aside from the matter of consent; but, if the actual appearance of one who is insane cannot confer jurisdiction, by so much more it would seem that a mailed notice to such an one ought not to confer jurisdiction, for further procedure after the fact of insanity has been suggested to the charging body; at least, not until steps have been taken to see that the rights of the accused are properly protected by competent legal authority.

Before a society can proceed under such extraordinary circumstances, it should, at least, clearly and unmistakably appear that the laws of the society authorize jurisdiction to try an insane person upon a notice which has been merely addressed and deposited in the postoffice. Such we do not think appears in the laws of the appellant society;¹ and the burden being upon appellant to show expulsion, we think jurisdiction to try and expel was not established.

The respondent, as a mere beneficiary under the certificate, had no appeal from the decision of the local lodge

¹NOTE—Sec. 60 of the laws of the society provided that: "Any member against whom charges have been preferred shall have the right to be represented at the trial of the case by counsel. . . ."

Sec. 62, relating to the notice, provided: "When a lodge has fixed a time for considering the charge or charges preferred against a member, it shall be the duty of the lodge, through its recorder, to at once notify the accused in writing, to appear at the time appointed to plead to said charge or charges. This notice may be served personally or sent by mail to the last known post-office address of the accused. . . ."

This was a general law, governing the nonpayment of dues and charges of a like character.—REP.

to a higher tribunal within the order. Her husband was dead when the notice of his attempted expulsion was received, and he could not appeal. Respondent's only recourse within the order was to submit the matter to arbitration. This she offered to do, but appellant declined to grant an arbitration. Her only recourse left was through the courts. We therefore think that, for all the foregoing reasons, the challenge to the evidence was properly overruled.

Other assignments of error are based upon exceptions to the instructions given by the court. The criticized instructions are, however, in accord with our views hereinbefore expressed, and no useful purpose would be served by specifically discussing the instructions now.

The verdict of the jury was a finding against appellant upon the facts, under either theory advanced by it here, and since we think the trial court did not err, the judgment is affirmed.

FULLERTON, C. J., and MOUNT, DUNBAR, and ANDERS. JJ., concur.

[No. 4711. Decided December 29, 1903.]

OTTO EHRHARDT, *Appellant*, v. CITY OF SEATTLE.
*Respondent.*¹ •

MUNICIPAL CORPORATIONS—CHARTER—AMENDMENTS—CLERICAL ERROR IN NOTICE. An amendment to a section of a city charter relating to the filing of claims against the city is not invalidated by a clerical error in referring to the same as § 29, art. 8, in the resolution and notice submitting the same to a vote of the people, when it clearly appears from the section set out in full that § 29, art. 4, was intended.

¹Reported in 74 Pac. 827.

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SAME—SUBMISSION OF AMENDMENTS—RESOLUTION OF CITY COUNCIL—LEGISLATIVE ACT. A city council may submit amendments to the city charter to a vote of the people by a resolution, when the charter provision relating thereto simply provides that the amendments shall be "proposed" in the city council, since such resolution is temporary and ministerial in its nature, and is not a legislative act within the requirement of the charter that all legislative acts shall be by ordinance.

MUNICIPAL CORPORATIONS—ACTIONS—PRESENTING CLAIMS—EXCUSE FOR FAILURE TO PRESENT IN TIME. Where a claim was presented on the 31st day after the injury, a sufficient excuse for failure to present the claim within 30 days, as required by the charter, is shown by an allegation in the complaint that plaintiff was disabled by the injury from attending to any business for more than thirty days and that he presented the claim as soon as he was able to determine the extent of his injuries; and sustaining a demurrer to such a complaint is error, since plaintiff's incapacity is a question of fact for the jury.

Appeal from a judgment of the superior court for King county, Morris, J., entered April 8, 1903, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries. Reversed.

William Martin and *W. A. Keane*, for appellant.

M. Gilliam and *William Parmerlee*, for respondent, to the point that plaintiff's personal inability to present a claim was no excuse, if he was able to procure another to present it in his behalf, cited: *May v. Boston*, 150 Mass. 517, 23 N. E. 220; *Mitchell v. Worcester*, 129 Mass. 525; *McNulty v. Cambridge*, 130 Mass. 275; *Lyons v. Cambridge*, 132 Mass. 534; *Saunders v. Boston*, 167 Mass. 595, 46 N. E. 98.

MOUNT, J.—On the 10th day of September, 1902, appellant was injured by being thrown from his wagon while riding along a public street in the city of Seattle. On the 11th day of October following, he filed with the clerk and presented to the city council his verified claim for dam-

ages. Thereupon he commenced this action against the city to recover the damages for which his claim was filed. He alleged in his complaint that his injuries were caused by the negligence of the respondent in allowing the street upon which he was driving to be and remain in a defective and dangerous condition. The city demurred to this complaint, and the demurrer was sustained by the court upon the ground that the claim for damages was not presented within time. Plaintiff refused to plead further, whereupon final judgment was entered dismissing the action. Plaintiff appeals, contending (1) that the city charter which requires claims of this kind to be filed within thirty days is invalid, and (2) that a sufficient excuse for failure to present the claim within the thirty days is alleged in the complaint.

(1) Prior to March 4, 1902, § 29, art. 4, of the city charter of Seattle was as follows:

"All claims for damage against the city must be presented to the city council and filed with the clerk within six months after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation."

Art. 8 of the city charter of Seattle has reference to the board of public works. § 29 is as follows:

"Said board shall, when authorized by ordinance of the city council, construct such sewers, reservoirs, and pumping works, whether within or without the city, as may be

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necessary to carry out the general system of sewerage of the city."

On the 16th day of December, 1901, the city council of Seattle passed the following resolution:

"Resolution No. 635. Proposed Amendment No. 2. A resolution and proposition to amend § 29 of art. 8 of the city charter, and providing for the submission of such proposed amendment to the qualified voters of the city of Seattle at the next general election. Be it resolved by the city council of the city of Seattle as follows: That § 29 of art. 8 of the city charter of the city of Seattle be amended so as to read as follows: § 29. All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon pursuant to said reference. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation."

This resolution was regularly entered upon the journal, and the ayes and noes recorded thereon. Thereafter a notice, as required, was regularly given for the submission of the proposed amendment to the electors, in which notice it was stated that the proposed amendment was No. 2, and "the proposed amendment to § 29 of art. 8 of the city charter relating to the filing of claims for damages against the city," and a direction was given to the voters how to vote for and against the proposed amendment. At the election held thereafter on March 4, 1902, the amendment was adopted by a large majority of the electors, and subsequently, by a proclamation of the mayor, was declared

a part of the charter of Seattle. It is contended by appellant that the proposed amendment is invalid for two reasons: (1) because upon its face the resolution purports to amend § 29 of art. 8 to which it is not germane, while § 29 of art. 4 remains unchanged; (2) because the object of the resolution is not clearly expressed in its title. It is apparent from a reading of § 29 of art. 8 and § 29 of art. 4 of the charter above quoted, that the object of the resolution was to amend § 29 of art. 4, and that the insertion of the words "art. 8" was a clerical error. The real question, therefore, is whether or not a resolution of this kind falls within the provision of § 10 of art. 4 of the city charter, which is as follows:

"Every legislative act of the city shall be by ordinance: every ordinance shall be clearly entitled, and shall contain but one object which shall be clearly expressed in the title. The enacting clause of every ordinance shall be: 'Be it enacted by the city of Seattle as follows.'"

This provision of the city charter manifestly applies to ordinances, as that term is commonly understood, such as are purely legislative as laws of the city which by their nature prescribe a general and permanent rule. Legislation of this character must be passed in the manner and with the formalities provided in that section, but it does not follow that resolutions, which are initiative or of a temporary nature and are ministerial merely, are to be classed as *legislative acts*, and adopted with the same formality as permanent laws. It is said by Horr & Bemiss in their work on Munc. Police Ordinances, at § 210, that:

"A resolution is a less formal act than an ordinance. All legislative acts of a municipal corporation which are to have continuing force and effect, and which are to constitute regulations of local matters until repealed or supplanted, are permanent in their nature and must be expressed in the form of ordinances. But municipal cor-

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porations have many other acts to perform of a quasi-legislative nature which are purely temporary in their effect. . . . As a rule, all matters upon which the council wishes to *legislate* must be put in the form of an ordinance, and all acts that are done in its *ministerial* capacity may be done in the form of resolutions. Of course, if any other mode is prescribed it must be closely adhered to. Resolutions are not subject to the formalities prescribed for the enactment of ordinances, unless specifically directed."

To the same effect see: Elliott's Elements of Munc. Corp., § 193; Beach, Munc. Corp., §§ 483, 484; *Burlington v. Dennison*, 42 N. J. L. 165.

Section 1 of art. 20 of the charter of Seattle, relating to the manner of amending the charter, provides:

"§ 1. Any amendment or amendments to this charter may be proposed in the city council, and if the same shall be agreed to by a majority of all the members elected, such proposed amendment or amendments shall be entered upon the journal, with the yeas and nays of the members voting thereon. Upon the passage of any such amendment or amendments, the same shall be submitted to the electors of the city."

No formality is provided for proposing such amendments. The provision is that the amendment shall be *proposed* in the city council. There are no specific directions for such proposal, and no requirement that the proposal shall be in the form of an ordinance, or that any formality shall be observed. Since a proposal of this kind is not legislative in the sense that it is a permanent law regulating the affairs of the city over which the council has control, we conclude it is, and was intended by § 1 of art. 20, *supra*, to be a ministerial or quasi-legislative act, and therefore, under the authorities cited, may be passed by resolution without the formalities required of an ordinance. Several authorities are cited by appellant to the effect that

an act of the legislature which attempts to amend another act by reference to its section merely is void. The authorities cited are in point upon that question, but they are not in point upon the question under consideration, for the reasons above given. The lower court was right, we think, in holding the amendment valid.

But the case must be reversed for the reason that plaintiff alleged a sufficient excuse for not presenting his claim within the thirty days. The claim was presented on the 31st day after the injury. The complaint alleges:

"That, for more than thirty days after the plaintiff was injured, the plaintiff suffered great pain, and was disabled from attending to or transacting any business, and was confined to his bed the greater portion of said time; and that, on or about the 11th day of October, 1902, and within six months after the claim for damages hereinbefore alleged accrued, and as soon as plaintiff was able to determine with a reasonable degree of certainty the extent of his injuries which he received as hereinbefore alleged, he presented to the city council of defendant, the city of Seattle, and filed with the clerk of said city, a claim for the damages hereinbefore set forth, being the same damages sued for in this action; and that plaintiff did not know and was unable to determine at said 11th day of October, 1902, or even after said date, that he would be crippled for life as a result of his said injuries; and that said claim was disallowed by said city council, and more than sixty days elapsed after the presentation of said claim, as aforesaid, and the commencement of this action."

In the case of *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386, we held that the plaintiff was not required to file his claim within thirty days where there was such mental or physical incapacity as to make it unreasonable for him to do so, and that such incapacity was a question of fact for the jury. The allegation of the complaint in that case was

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to the effect that the injuries received so crippled and disabled the plaintiff that he was confined to his bed for ten weeks from the date of the accident, and was by reason thereof unable to attend to the filing of his claim.

In the case at bar the allegation is that for more than thirty days after the injury the plaintiff was disabled from attending to or transacting *any business*. While this allegation is not as specific as the one in *Born v. Spokane*, it is broader, because it shows incapacity for any business. If it is true that plaintiff was disabled from transacting any business for more than thirty days, then, under the rule in *Born v. Spokane*, he was excused for not filing the claim until the thirty-first day. This case in this respect is not distinguishable from that. The court therefore erred in sustaining the demurrer upon the ground that the claim was not filed in time.

The cause is reversed, with instructions to overrule the demurrer.

FULLETON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4819. Decided December 29, 1903.]

EVA EGGLESTON, *Respondent*, v. CITY OF SEATTLE, *Appellant*.¹

NEGLIGENCE — DAMAGES — PHYSICIAN'S SERVICES — FAILURE TO PROVE AMOUNT PAID—INSTRUCTIONS. In an action for personal injuries where no specific sum is claimed as damages on account of the employment of certain physicians, who treated plaintiff for serious injuries, and no evidence was introduced as to the value of such services extending over a considerable period, an instruction that the jury are not to consider any damages of this character, "unless there is evidence in the case . . . that such damages were sustained . . . and had a reasonable value,"

¹Reported in 74 Pac. 806.

33 671
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is not erroneous as assuming that there was any such evidence, or as an instruction upon evidence not in the case.

SAME—INSTRUCTIONS—WHETHER ANY EVIDENCE IN SUPPORT OF AN ISSUE—SUBMISSION TO JURY. Where there is no evidence tending to prove an issue, the court may properly so instruct the jury, but it is not error to fail to do so, where no request therefore is made.

Appeal from a judgment of the superior court for King county, Albertson, J., entered March 28, 1903, upon the verdict of a jury rendered in favor of plaintiff for \$1,000 for personal injuries sustained by reason of defects in a sidewalk. Affirmed.

M. Gilliam and William Parmerlee, for appellant. It was error to submit the question of damages on account of physician's services when there was no evidence in the case as to the value thereof. *Reed v. Chicago etc. R. Co.*, 57 Iowa 23, 10 N. W. 285; *Eckerd v. Chicago etc. R. Co.*, 70 Iowa 353, 30 N. W. 615; *Duke v. Missouri Pac. R. Co.*, 99 Mo. 347, 12 S. W. 636; *Smith v. Chicago etc. R. Co.*, 108 Mo. 243, 18 S. W. 971; *Madden v. Missouri Pac. R. Co.*, 50 Mo. App. 666; *Galveston etc. R. Co. v. Thornsberry* (Tex.), 17 S. W. 521; *Little Rock etc. R. Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097; *Cousins v. Lake Shore etc. R. Co.*, 96 Mich. 386, 56 N. W. 14; *Page v. Delaware etc. Canal Co.*, 34 N. Y. App. Div. 618, 54 N. Y. Supp. 442; *Pittsburg etc. R. Co. v. Zepperlein*, 1 Ohio Cir. Ct. 36, 1 Ohio Cir. Dec. 22. The instruction would be error unless there was evidence that the charges were reasonable. *Missouri etc. R. Co. v. Reasor*, 28 Tex. Civ. App. 302, 68 S. W. 332; *Gumb v. Twenty-Third St. R. Co.*, 114 N. Y. 411, 21 N. E. 993; *Reynolds v. Niagara Falls*, 81 Hun 353, 30 N. Y. Supp. 954; *North Chicago etc. R. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Golder v. Lund*, 50 Neb. 867, 70 N. W. 379; *Hewitt v. Eisenbart*, 36 Neb.

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794, 55 N. W. 252; *Salida v. McKinna*, 16 Colo. 523, 27 Pac. 810.

Wilmon Tucker and Ivan L. Hyland, for respondent.

FULLERTON, C. J.—In this action the respondent sought to recover for personal injuries alleged to have been caused by a defective sidewalk of the appellant city. She laid her damages at \$10,000, and was awarded \$1,000 by the jury. There was substantial testimony to the effect that the sidewalk where the injury occurred was out of repair, and had been so for a considerable time prior to the happening of the accident. It appeared also that the injuries suffered by the respondent were considerable; her collar bone was broken, her left arm dislocated at the shoulder, and she suffered bruises which incapacitated her to a considerable extent.

Among the allegations of her complaint, the respondent alleged that, on account of her injuries, she was compelled to, and did, employ certain physicians and surgeons to attend on her, but claimed no specific sum as damages on account thereof. Her testimony also was to the effect that she had been treated by certain physicians and surgeons, and that their services extended over a considerable period of time, but no evidence was introduced as to the value of such services, nor as to amounts she had paid, or had become obligated to pay, on account of the same. Upon this subject the court charged the jury as follows: "There is an allegation in the complaint that, in addition to these injuries, she has suffered a damage by reason of having to employ physicians and incurring expenses of that character. You will not consider, in making up your verdict, any damages of this character, unless there is evidence in the case before you that such damages were sustained and such

expenses were incurred—were reasonably incurred, and they had a reasonable value for which she is liable.” The court also gave the usual instruction to the effect that the jurors were the exclusive judges of the facts, adding: “It is not for the court to say what the testimony is, or what weight should be given to it.” The appellant assigns as error the giving of the first instruction above quoted, and this presents the sole question to be determined on this appeal.

It is undoubtedly a general rule that it is error for a trial court to submit for the determination of the jury a matter upon which there has been no evidence adduced at the trial, when the manner of such submission assumes that there was such evidence, and that the jury are at liberty to find on the particular matter without determining the question whether there was or was not evidence in support thereof; and a number of cases have been cited to us where it has been held error in actions for personal injuries for the court to submit to the determination of the jury the amount of damages sustained by the plaintiff, by reason of being compelled to procure medical services, when the only evidence on the question was that the plaintiff was injured and did engage the services of a physician to treat him therefor.

But it seems to us that neither the general rule above cited, nor the rule announced in these cases, is in point on the question presented here. The learned trial judge did not assume, in the instruction complained of, that there was evidence from which the jury would be warranted in finding damages to the respondent because she was compelled to procure the services of physicians and surgeons; but, on the contrary, he instructed them that they should not find any damages of that character unless they further

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found that there was evidence in the case showing that such damages were sustained, and that they had a reasonable value for which she had become liable. In other words, the trial court, instead of determining the question itself, left it to the jury to say whether or not there was evidence before them of the reasonable value of such services, and the respondent's liability therefor.

Under the practice of this state, when there is no evidence tending to prove a particular issue, the court may properly so instruct the jury, whether requested so to do or not, and it may be that, if such request is made, it is its duty to do so in all cases. But we cannot think it reversible error for the court to submit to the determination of the jury the question whether there was or was not evidence on a particular issue when the party interested has failed to ask to have it determined by the court. A case of this character usually involves many minor issues, of more or less importance in themselves, perhaps, but the determination of any one of which does not affect the verdict any more than it may increase or diminish it. To issues of this character the court's attention is but momentarily directed, and it would be too much to expect that he would remember whether or not the proofs on each particular issue were or were not so far complete as to warrant the jury in making a finding thereon. When he is left to his own resources, therefore, he may properly state to the jury the evidence necessary to warrant a finding on the particular point, and leave it for them to say not only whether there is sufficient evidence to find thereon, but whether there is any evidence at all on the matter.

The cases where this precise question was decided seem not to be many. Indeed, from the numerous citations made by counsel and the references which they contain, we have

found but two which can be said to squarely determine the point. In these it was held that the court might properly leave the question to the jury even though requested to charge that there was no evidence of the particular fact. In *Knox v. Fair*, 17 Ala. 503, the court said:

"When there is no evidence tending to prove a particular fact, the court may so instruct the jury, whether the evidence be oral or written. . . . But I know of no case that holds it to be erroneous, should the judge decline so to charge, when the testimony is all given orally from the stand, and the facts deposed to, numerous and minute. Indeed such a practice would lead to the necessity of taking down all the evidence in writing, that the court might clearly see whether there was any proof tending to prove the particular fact. It is certainly the duty of the prescribing judge to pay particular attention to every part of the testimony, that he may be enabled correctly to instruct the jury on the questions of law involved, but when many witnesses are examined, and the facts detailed by them numerous, we would not hold that the court erred, should he charge the jury hypothetically, and refuse to charge that there was no testimony tending to prove a particular fact."

For the other case, see *Lancaster County Bank v. Albright*, 21 Pa. St. 228.

The judgment is affirmed.

MOUNT, HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4650. Decided December 31, 1903.]

JOHN S. BAKER, *Respondent*, v. NORTHWEST BUILDING &
INVESTMENT COMPANY *et al.*, *Appellants*.¹

ACTIONS—ABATEMENT—PARTIES—SUBSTITUTION—TRANSFER OF INTEREST PENDING APPEAL. Where a temporary injunction restraining a public nuisance is granted at the suit of the owner of property specially affected thereby, and an appeal from such injunction is taken, a purchaser of the property pending the appeal is entitled to be substituted as plaintiff and respondent in place of the former owner, under Bal. Code, § 4837, providing that a suit shall not abate by the transfer of any interest therein.

Application to substitute Peter A. Berg, successor in interest of the respondent, upon an appeal from an order of the superior court for Pierce county, Chapman, J., entered February 24, 1903, temporarily restraining a public nuisance specially injurious to certain lots owned by the plaintiff, and transferred to said Berg pending the appeal. Granted.

Charles O. Bates, for applicant, Peter A. Berg.

James F. O'Brien and *Newton H. Peer*, for appellants.

J. M. Ashton and *W. L. Sachse*, for respondent.

PER CURIAM.—This was an application by Peter A. Berg to be substituted as plaintiff and respondent in this case in place of John S. Baker. The action was brought in the lower court by John S. Baker to restrain the continuance of a public nuisance in the city of Tacoma. The complaint alleges in substance that the plaintiff was the owner of three certain lots of land in Tacoma adjoining property upon which a bawdy house was being maintained by defendants, and that, by reason of the proximity of said

¹Reported in 74 Pac. 825.

bawdy house to his said lots, plaintiff was specially injured in a manner different from the general public. Upon a hearing in the lower court defendants' demurrer to the complaint was overruled, and an injunction *pendente lite* was issued. From the order overruling this demurrer and granting the restraining order, the defendant appealed to this court. After the appeal had been taken, the respondent Baker sold all his interest in and to the lots owned by him, and described in the complaint, to the applicant, Peter A. Berg. Mr. Berg now moves this court to be substituted as respondent in place of Mr. Baker.

We think the application should be granted. § 4824, Bal. Code, provides that every action shall be prosecuted in the name of the real party in interest. § 4837 provides that no action shall abate by the transfer of any interest therein, if the cause of action survive or continue, but the court may allow the action to be continued by the successor in interest. Under code provisions similar to our own, substitution has been allowed in the following cases: *Mc Kinnis v. Scottish Am. Mortgage Co.*, 55 Kan. 259, 39 Pac. 1018; *Keough v. McNitt*, 7 Minn. 29; and *Nickerson v. Crawford*, 11 N. Y. Supp. 503.

The respondent, having sold and assigned all of his right, title, and interest in and to the property affected by the nuisance, has no further special interest in the case. The fact that he was the owner of the property described, and that this property was specially affected differently from other property in the community, gave him standing to maintain the action in a court of equity. Without these facts appearing, he was not entitled to maintain the action for injunctive relief. When he parted with the property, he parted with his right to maintain the action. The cause of action, however, continued with the property. The new owner has the same right to maintain the action as the old

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owner had. When the applicant purchased the property, he succeeded to all the rights of the respondent, and, under the plain terms of the statute above named, is entitled to be substituted as respondent and to have exclusive control of the litigation. The application is therefore granted, and the applicant is substituted as respondent in place of John S. Baker.

[No. 4781. Decided December 31, 1903.]

A. W. SPAULDING, *Respondent*, v. E. C. BURKE *et al.*,
Appellants.¹

MECHANICS' LIENS—SERVICES OF ARCHITECT—PARTNERSHIP WITH OWNER—LIENABLE AND NON-LIENABLE ITEMS. Where one member of a firm of architects individually enters into a partnership arrangement with the owner of premises, whereby he acquires an interest in a building in consideration of plans and services as an architect in the construction thereof, and subsequently he withdraws from such arrangement in consideration of \$1,500 to be paid by the owner, \$900 of which he claims for his interest in the premises, and \$600 for his services as architect, he can not claim a mechanics' lien against the building for the \$900 agreed to be paid in release of his interest in the partnership.

SAME—APPLICATION OF PAYMENTS—ACCOUNTING WITH ASSOCIATES—RELEASE OF LIEN. Where \$1,000 is paid on such contract, and the architect accounts to his firm for the \$600 due for architect's services, such accounting amounts to an application of the payment to the charge for architect's services, and he can not subsequently apply the payment in liquidation of the part of the contract not covering lienable items, nor enforce a mechanics' lien against the building for the balance due.

SAME—FORECLOSURE OF LIEN—PERSONAL JUDGMENT ON FAILURE OF LIEN. In an action to foreclose a mechanics' lien in which the lien fails, personal judgment may be entered against a defendant personally liable for the claim, but without costs incident to the lien.

¹Reported in 74 Pac. 829.

APPEAL—REVIEW—FINDINGS—GENERAL EXCEPTION. Where a finding that a contract was made by a husband and wife is not excepted to by the wife otherwise than by a general exception to the judgment, the wife can not urge for the first time on appeal that there was no testimony connecting her with the contract.

PLEADING—COUNTER CLAIM—DAMAGES FOR BREACH OF CONTRACT—ESTOPPEL—PLEADING PAYMENT IN FULL. In an action upon a contract for architect's services, the defendant, by attempting to show a voluntary payment in full is estopped to claim damages for defective work under a counterclaim which fails to allege that the defects causing the damage arose after the payment and could not reasonably have been discovered prior to that time.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 22, 1903, upon findings in favor of the plaintiff, after a trial upon the merits before the court without a jury, foreclosing a mechanics' lien. Modified.

Moore & Farrell, for appellants Burke and wife.

John P. Hartman, for appellant Ackerson.

Byers & Byers, for respondent.

HADLEY, J.—The respondent brought this suit against appellants to foreclose an alleged lien upon certain real estate belonging to appellants Burke and wife. The claim of lien is based upon the alleged services of respondent as an architect in preparing plans and specifications for a building to be erected upon the said real estate, and in superintending the construction thereof as the architect in charge. A written agreement was entered into, signed by appellant E. C. Burke and respondent, whereby, in consideration of the sum of \$1,500 to be paid by said Burke, the respondent agreed to furnish the necessary plans and specifications, and to look after the construction, of a twelve-apartment building. It is alleged that \$1,000 and no more

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has been paid, and foreclosure of a lien is demanded for the balance.

Appellant Ackerson answered separately, denying material allegations of the complaint, admitting that she claims a lien against the premises, denying that it is inferior to respondent's alleged lien, and alleging that it is a first lien. Appellants Burke and wife answered, admitting the claim of appellant Ackerson, and alleging, that at all times mentioned the respondent and one A. J. Russell were copartners, under the firm name of Spaulding-Russell Company; that appellant E. C. Burke entered into a written contract with respondent and said Russell as said firm; that it was agreed and understood that said firm should furnish the plans, specifications, and details, and should superintend the construction of said building, for the sum of \$1,500; that, prior to the commencement of this action, the said sum was fully paid. The answer also sets up a claim for damages by way of counterclaim for alleged defective work.

A trial was had before the court without a jury, which resulted in a judgment in favor of respondent against appellants Burke and wife for the sum of \$500 and interest, together with an attorney's fee of \$150 and costs. The judgment was also declared to be a first lien upon the said real estate, and foreclosure of the lien was decreed. This appeal is from said judgment and decree.

The principal contention of appellants is that the contract for the services was with the firm of Spaulding-Russell Company, and that the services were rendered by that firm rather than by respondent individually. It is therefore urged that respondent cannot himself maintain this action, since he is not, as an individual, the party in interest. The original written contract purports to have been signed by respondent as an individual, and neither

the writing, nor the signature thereto, makes any reference to the firm of Spaulding-Russell Company. Nevertheless, the firm of Spaulding-Russell Company existed when the written contract was signed, and the firm was engaged in conducting the general business of architects. Certain negotiations were had between respondent and appellant E. C. Burke, which involved, among other things, the services of the former as an architect. Such negotiations began some weeks before the formation of the partnership between Spaulding and Russell, but the aforesaid written agreement was made after the partnership came into existence.

Respondent testified that the original negotiations contemplated a partnership arrangement between himself and appellant E. C. Burke by which respondent was to share in the ownership of the property when improved, and that his services were to be considered as a contribution to this arrangement. He further testified that, after acting for a time under such an understanding, he desired to withdraw from the partnership arrangement with Burke, and that it was agreed that Burke should pay him \$1,500 as a consideration for his withdrawal from, and release of, his interest in that arrangement, and also as further consideration for his services in furnishing the plans and specifications, and in superintending, as an architect, the construction of the building which Burke proposed to erect; said building to be of the same plan as originally contemplated under the joint arrangement. The written contract was the consummation of the last named arrangement. He also testified that, immediately after the contract was made, he told Russell, his partner in the architect business, that \$600 of the \$1,500 covered by the contract, would go to the firm of Spaulding-Russell Co., for the architect's services, and that the balance of \$900 would go to the respondent himself as his compensation for the release of his interest in the joint

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arrangement between himself and Burke. Russell denied that respondent made such a statement to him, and insisted that the entire proceeds of the written contract were intended to cover architect's services only, that the firm rendered the services, and that the whole sum belonged to it.

Accepting, however, the statement of respondent, by which he must be bound, it follows that he did turn over to the firm of Spaulding-Russell Company an interest in the contract with Burke to the extent of \$600, which sum he says was to cover the architect work contemplated by the contract. Under the respondent's own statement, therefore, the architect firm became interested in the contract to the extent of the actual architect services, and the remainder belonged to him as his compensation for releasing his interest in his arrangement with appellant E. C. Burke. Respondent admits the payment of \$1,000 upon the \$1,500 contract, and says he has accounted to the firm of Spaulding-Russell Company for \$600 which belonged to said firm for the architect services. This accounting, he said, was made by statements respectively between the Seattle and Tacoma offices of said firm, in which statements the \$600 item was included.

Accepting the statement of respondent as true, it would thus appear that the claim for architect services has been paid. That claim was the only lienable item included in the contract between respondent and appellant E. C. Burke. As we have seen, the remaining \$900 was of such a nature that no lien can be enforced therefor. It was simply founded upon a promise to pay that sum in consideration of a release of interest in a joint scheme for owning lots and improving them. No element of a lien exists in such a contract. \$400 upon the remaining \$900 has been paid, and respondent seeks to enforce a lien for the balance of \$500.

Respondent contends that there was no agreement, when the \$1,000 was paid, as to how it should be applied, and that he therefore has the right to apply the same to the liquidation of that portion of the contract amount not covering lienable items, which he claims discharges that amount, pays \$100 on the lienable architect claim, and leaves \$500 thereof subject to enforcement as a lien. Conceding that respondent had a right to apply the payments as he chose, it follows from what has already been said of his own testimony that he chose to, and did, apply \$600 thereof to the payment of the architect claim. When he accounted to the firm for that \$600 as paid, he thereby applied so much of the \$1,000 to that purpose. We think it follows that no lien can be maintained for the balance.

The findings and conclusions of the court sustain respondent's theory that appellant E. C. Burke is personally liable for the remaining \$500. We think, under the evidence, that the court did not err in that particular, and that personal judgment was properly entered in the action. § 5911, Bal. Code. The personal judgment is also against appellant Matilda Burke, the wife of E. C. Burke; and it is urged that the court erred in its finding numbered 2, wherein it was found that the aforesaid written contract was made by both E. C. Burke and wife, through E. C. Burke. It is urged that there was no evidence which connected Matilda Burke with the contract. The record discloses no exception to that finding. It is true, Matilda Burke did except generally to the decree, as did all the appellants, but it is not specified that her exception is specially directed to the personal judgment feature, and it does not appear that the court's attention was called to the matter now urged in her behalf. Without an exception to the finding upon which the personal judgment against her was founded, thus clearly challenging the

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court's attention to the point, we do not think she should now be heard to raise it for the first time. *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266, 53 Pac. 49, 1101.

It is assigned that the court erred in sustaining respondent's objection to the introduction of evidence in support of the averments in the way of counterclaim. We think the court did not err in that regard. Prior to the offer of this evidence, appellants had introduced evidence to the effect that payment in full of the contract amount had been made. The averments in the counterclaim did not state that the alleged defects causing the damages claimed arose after that payment was made, and that they could not reasonably have been discovered prior to that time. Having attempted to show full payment at a time when the damage, if any, existed, we think, under the counterclaim as pleaded, that appellants were thereafter estopped to urge damages in reduction of a contract amount which they also claimed to have voluntarily paid in full.

For the foregoing reasons we think the judgment should be modified in the following particulars, to wit: The decree of foreclosure should be vacated, and the personal judgment modified to the extent of excluding therefrom any amount for attorney's fees or costs incident to the preparation and filing of a lien notice. The cause is remanded with instructions to the lower court to proceed in accordance herewith.

FULLERTON, C. J., and ANDERS, MOUNT, and DUNBAR, JJ., concur.

[No. 4789. Decided January 2, 1904.]

TWYMAN O. ABBOTT, *Appellant*, v. NEWMAN KLINE,
Respondent.¹

SUBSCRIPTIONS—CONTRACT FOR RAILWAY SUBSIDY—CONSTRUCTION—INDEFINITENESS—COMPLAINT—SUFFICIENCY. A complaint to recover a subscription to aid in the construction of a railway does not state sufficient facts to constitute a cause of action when the same is based upon correspondence set out in the complaint from which it appears that there was no part performance, the line having been already located to run near the defendant's land, pursuant to an undisclosed oral conversation, and no binding agreement had been made, and plaintiff left it to defendant to do whatever he thought proper, while the defendant wrote he would be willing to aid to the extent that others did, and would decide later if he could pay cash or give land, explaining that the land was under mortgage and he could not give title; such contract being too indefinite and uncertain to sustain an action.

Appeal from a judgment of the superior court for King county, Bell, J., entered December 26, 1902, dismissing the action upon sustaining a demurrer to the complaint. Affirmed.

T. O. Abbott, for appellant, cited the following as cases arising upon similar facts: *New York etc. R. Co. v. Pixley*, 19 Barb. 428; *Des Moines Val. R. Co. v. Graff*, 27 Iowa 99, 1 Am. Rep. 256; *Hoffman v. Bloomsburg etc. R. Co.*, 157 Pa. St. 174, 27 Atl. 564.

Fred Rice Rowell and Walter B. Beals, for respondent. The correspondence was too indefinite to constitute a contract. *Mississippi etc. S. S. Co. v. Swift*, 86 Me. 248, 29 Atl. 1063, 41 Am. St. 545; *Lyman v. Robinson*, 14 Allen 242; *Sidney Glass Works v. Barnes*, 33 N. Y. Supp. 508; *Harens v. American etc. Ins. Co.*, 11 Ind. App. 315, 39 N. E. 40; *Meyers v. Smith*, 48 Barb. 615; *Harvey v. Facey*, 62 L. J., P. C. 127, 69 L. T. 504.

¹Reported in 74 Pac. 1014.

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PER CURIAM.—This is an action to recover upon an alleged contract of subscription to aid in the construction of a railway. Probably the best way to dispose of it will be to set out the complaint verbatim.

“Plaintiff complains of the defendant and for an amended complaint and cause of action alleges:

“(1) That at all times hereinafter mentioned the Tacoma & Steilacoom Railway Company was a corporation organized under the laws of the state of Washington.

“(2) That on the 3d day of October, 1890, the defendant was the owner of a certain tract of land in Pierce county, Washington, known as Voight's Addition to the city of Tacoma, and said premises were of the value of forty thousand dollars (\$40,000.)

“(3) That prior to said date the Tacoma & Steilacoom Railway Company was making a survey for a line of electric railway to be run from the city of Tacoma to the town of Steilacoom, in said Pierce county, and the defendant on said 31st day of October, 1890, for the purpose of having said railroad run near his said premises, promised and agreed in writing with said Tacoma & Steilacoom Railway company, that if said company would construct said railroad so that the same would run by the southeast corner of said premises, defendant would convey to said Tacoma & Steilacoom Railway Company one-eighth of said premises, or pay a sum equal to the value of one-eighth of said premises; that said contract was contained in correspondence between said parties, in letters written by the plaintiff to the defendant and in letters written by the defendant to the plaintiff, which constitutes the contract between the plaintiff and the defendant, as follows, to-wit:

“(Dictated)

Sept. 16, 1890.

“Mr. Newman Kline,

“care of N. P. R. R. St. Paul, Minn.

“My Dear Kline: I enclose you herewith map of the proposed route of my railroad to Steilacoom. By it you will see that I run to the southeast corner of your tract. This is the result of the conversation which I had with you

when in St. Paul recently. Immediately upon my return home I had surveys and an examination of the route made and concluded at once to establish it as you see here shown. I enclose you also a deed to be placed in escrow with the National Bank of Commerce, both of which you may execute and send to them. Insert such lots as you think proper under the circumstances. I am willing to trust your judgment and know you will do the fair thing. I am sorry I did not see you on leaving St. Paul. The route is now being graded from the city limits to your corner, the men being now engaged in clearing and cutting immediately at your corner.

Enc.

Very sincerely yours, T. O. Abbott.'

"Sept. 20th.

"My Dear Abbott:—Your letter of the 15th recd. I shall be pleased to "ante" on the proposition to the same extent that others do in my neighborhood. Will you kindly inform me what that is? There is a little mtge. on that piece of land—I cannot give you a title, but am perfectly willing to do anything so you will get the subsidy at the proper time. I would like to ask when you expect to have the line in operation; there are several inquiries I would like to propound to you in this connection. Do you calculate to come east soon? Have you not some people here in St. Paul who are interested with you and to whom I can talk?

"Yours very truly, Newman Kline.'

"(Dictated)

Sept. 24, 1890.

"My Dear Kline: Your favor of the 20th inst. at hand. In reply will say that I have requested, and with two exceptions, have received from each property holder along the line one-eighth of all their holdings. This is the basis upon which we have proceeded in the construction of the road. We expect to have the road in operation on or about the 1st of February. In reply to your inquiry whether I expect to be east soon will say that it is likely that I will within the next 30 or 60 days. The mortgage to which you refer on your tract need cut no figure if you will except and warrant against the same in your deed to us.

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Knowing that you will do what is right I have only to consent to leaving the matter to your own good judgment.

"Very truly yours, T. O. Abbott."

"October 3rd.

"My Dear Abbott: I have your letter of the 24th Sept., regarding a subsidy for your railroad to Steilacoom. Am pleased to be able to aid the enterprise and recognize the benefit it will be to my tract—and admit that without a quick transit scheme the land is of little value. Just at this time I am meeting several mortgages and do not want to put a contract on paper that may have to stand against the property. On my aid, to the extent that others have given, you may rely as above stated I want the line to strike my corner. In another month or a little later, shall be in a position to say if I can pay cash or if will give land and I trust neither interest will be prejudiced by asking you to permit me to stand you off until I see my way a little clearer as to what is the best way for me to perform the proper caper. Hope I may see you when you come east again.

"Yours very truly, Newman Kline."

"(4) That said Tacoma & Steilacoom Railway Company, pursuant to said agreement, did construct its said railroad from the city of Tacoma to the town of Steilacoom, so that the said road ran by the southeast corner of defendant's said premises. But that defendant has failed and neglected to convey one-eighth of said premises to said Tacoma & Steilacoom Railway Company, or to plaintiff, but on the contrary has sold and conveyed all of said premises to other parties, and has also failed and neglected to pay one-eighth of the value of said premises.

"(5) That prior to the commencement of this action, said Tacoma & Steilacoom Railway Company assigned all its right and interest under said agreement to plaintiff, who is now the owner thereof.

"(6) That plaintiff has demanded of defendant the payment of a sum equal to one-eighth of the value of said premises, but that defendant neglected and refused to pay the same.

"Wherefore, plaintiff demands judgment against the defendant for the sum of five thousand dollars (\$5,000), and for costs and disbursements of this action."

A demurrer was interposed to this complaint on the ground that it did not state facts sufficient to constitute a cause of action, and that the action had not been commenced in the time limited by law, which demurrer was sustained. Plaintiff offered to file a second amended complaint, which the court refused to permit. Judgment was entered, and from judgment of dismissal the appeal is taken.

We think the demurrer was properly sustained. We have examined all the cases cited by the appellant, in both his original and reply briefs, and none of them, we think, sustain a cause of action where the agreement was as indefinite and uncertain as the agreement set forth in the complaint. The question of part performance upon which the appellant relies does not, it seems to us, enter into this case under the allegations of the complaint, for it appears from the appellant's letter of September 16 that the announcement was made, when the information was conveyed to the respondent, that the line of definite location had been determined upon, and that by such determination the road ran to the southeast corner of the respondent's tract. So that it must appear that the establishment of the road to that point was not the result of the written agreement upon which the action is based, but that it was the result of some oral conversation between the appellant and respondent at some past time, which agreement does not appear. The appellant recognized at that time the fact that no binding agreement had been made, for he states that he inclosed an agreement for the respondent to sign, and in addition to that he leaves it

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open to the respondent to do what he thinks is proper under the circumstances.

The balance of the correspondence is as uncertain and indefinite as is the first part, and the last letter written by the respondent on October 3 plainly indicates that the respondent, while he is willing to do something, has not yet made up his mind just what that something will be, and we hardly see how it would be possible for a court to gather from this correspondence an agreement which could be specifically enforced. If the property remained in the possession of the respondent, and an action were brought for specific performance, it seems to us clear that the contract relied upon was not sufficiently definite and certain to sustain such an action. The fact that the property has passed from the possession of the respondent, and that the remedy is asked in a different form, would not warrant a more liberal construction of the correspondence.

We are not disposed to interfere with the discretion which the trial court exercised in not allowing a further amended complaint to be filed, although an examination of that complaint satisfies us that even it does not allege an enforceable contract.

Affirmed.

[No. 4743. Decided January 2, 1904.]

THE SEATTLE LUMBER COMPANY, *Appellant*, v. BO
SWEENEY *et al.*, *Respondents*.¹

MECHANICS' LIENS—NOTICE—SUFFICIENCY—STATING TERMS OF CONTRACT. Under Bal. Code, § 5904, the notice of claim for a mechanic's lien need not state the terms and conditions under which the materials were purchased as formerly required by Hills Code, § 1667.

¹Reported in 74 Pac. 1001.

SAME—STATEMENT OF OWNERSHIP OF PROPERTY. Under the liberal construction required by Bal. Code, § 5917, a lien notice stating that the defendants were the owners of the property at the time the materials were furnished authorizes the construction time they are still the owners when the lien notice is filed.

SAME—GENERAL LIEN ON SEPARATE BUILDINGS—VALIDITY—POSTPONEMENT TO SPECIFIC LIENS. Bal. Code, § 5907, authorizes a single mechanic's lien against separate lots for five buildings thereon where all are jointly owned by the same parties, and the failure to designate the amount claimed against each building only postpones the general lien to other liens which designate the amount due on specific property.

TIME OF FILING LIEN—COMPLAINT—SUFFICIENCY—CLERICAL ERROR IN NOTICE. Where a complaint for the foreclosure of a mechanic's lien alleges that the plaintiff commenced to furnish material March 19, and finished May 6, a statement that the notice was filed March 10 is clearly a clerical error, and it sufficiently appears to have been filed August 4, when it was executed on that day and the copy attached shows it was filed on that day.

SAME—COMPUTATION OF TIME OF FILING. When the last day of delivery was May 6, the lien claimant had all of August 4, which was ninety days thereafter, within which to file the lien.

Appeal from a judgment of the superior court for King county, Tallman, J., entered March 23, 1903, dismissing an action to foreclose a mechanic's lien upon sustaining a demurrer to the complaint. Reversed.

Preston, Carr & Gilman, for appellant.

Sweeney, French & Steiner, for respondents.

MOUNT, J.—This action was brought to foreclose a materialman's lien. The lower court sustained a demurrer to the complaint and dismissed the action. Plaintiff appeals.

The facts alleged in the complaint are, substantially, that on March 1, 1902, the defendants Sweeney and wife entered into a contract with George Barwick for the construction of five dwelling houses upon five lots in the city of

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Seattle; that by said contract Barwick and one P. J. Donohue, the architect, were made agents of Sweeney and wife for the construction of these buildings; that the said lots are contiguous to each other, and that Sweeney and wife were and are the owners thereof and of the dwelling houses erected thereon; that the materials furnished by the plaintiff were furnished to said Barwick and Donohue at their instance and request, between March 19 and May 6, 1902, and were delivered upon the premises for, and used in, the erection of said buildings; that plaintiff cannot say how much of said materials was used in any one of said buildings, but that the whole thereof entered into the construction of the buildings; that the reasonable value of the material so furnished and used is \$995; that \$706.80 has been paid thereon, and there remains due \$288.70; that after the delivery of said materials and within ninety days after the last delivery, to wit, on May 4, 1902, plaintiff filed its verified lien therefor, and that eight months had not elapsed since the said notice was filed. The lien notice, omitting the verification and formal parts, is as follows:

"Notice is hereby given that on the 19th day of March, 1902, the above named claimant, the Seattle Lumber Company, a corporation, at the special instance and request of George Barwick, contractor, and P. J. Donohue, architect, commenced to furnish material, to wit, lumber, to be used upon, and which was actually used in, the construction of those certain five one and one-half story frame dwelling houses, situated on certain lands and premises in King county, state of Washington, described as lots 2, 3, and 4 in block 62, in Kidd's Addition to the city of Seattle, of which property the owners and reputed owners were Bo Sweeney and Jane Doe Sweeney, his wife, whose true Christian name is unknown, and the furnishing of the said material ceased on the 6th day of May, 1902; that said materials furnished were of the reasonable value of \$995.50; that there has been paid on account of the same

\$706.80, and that there is now due and owing on account thereof the sum of \$288.70 and interest from the said 6th day of May, 1902, no part thereof has been paid, and that claimant claims a lien on said property and the whole thereof for the sum of \$288.70 and interest as aforesaid."

Respondent contends that there are three fatal defects in the lien notice, the first being that the notice does not disclose any contractual relations between defendants Sweeney and wife and Barwick and Donohue, at whose instance the materials were furnished, or that defendants Sweeney and wife caused said buildings to be erected. In *Warren v. Quade*, 3 Wash. 750, 29 Pac. 827, it was held, under § 1667, 1 Hill's Code, then in force, that the lien notice should state the terms and conditions under which the materials were furnished, and the relation existing between the owner and the builder to whom the materials were furnished, and that it was not sufficient that these facts appear in the complaint. This ruling was followed in several subsequent cases; viz., *Tacoma Lumber & Mfg. Co. v. Wilson*, 3 Wash. 786, 29 Pac. 829; *Heald v. Hodder*, 5 Wash. 677, 32 Pac. 728; *Fairhaven Land Co. v. Jordan*, 5 Wash. 729, 32 Pac. 729; and *Collins v. Snoke*, 9 Wash. 566, 38 Pac. 161. But in 1893, subsequent to the time of these decisions, the legislature of this state passed a new lien law, the provision requiring a statement of the terms and conditions of the contract was omitted, and a form of lien notice was provided for. § 1667 is now superseded by § 5904, Bal. Code. This latter section provides that a claim for lien substantially in the form provided "shall be sufficient." The authorities under the old statutes are not in point under the new. The notice in this case is substantially a copy of the form provided for by § 5904, *supra*, and is therefore sufficient. *Young v. Borzone*, 26 Wash. 4, 66 Pac. 135, 421.

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It is next contended that the notice does not state that Sweeney and wife were the owners of the property at the time the notice was filed. The statement in the notice is, "that on the 19th day of March, 1902, the above named claimant, the Seattle Lumber Company, a corporation, at the special instance and request of George Barwick, contractor, and P. J. Donohue, architect, commenced to furnish material, to wit, lumber, to be used upon, and which was actually used in, the construction of those certain five one and one-half story dwelling houses situated on certain lands and premises in King county, state of Washington, described as lots 2, 3, and 4, in block 62, in Kidd's Addition to the city of Seattle, of which property the owners and reputed owners were Bo Sweeney and Jane Doe Sweeney, his wife." This statement is to the effect that Sweeney and wife were the owners at the time the materials were furnished. The complaint alleges that the defendants were and now are the owners of the property. This allegation is sufficient. But if the notice cannot be aided by the allegations of the complaint, the notice of itself is sufficient in this respect, because if the defendants were owners at the time the materials were furnished the presumption follows that they are still owners. The statute at § 5917 is as follows:

"The provisions of law relating to liens created by this chapter, and all proceedings thereunder, shall be liberally construed with a view to effect their objects."

The object of the lien claim is to give notice to the owner. Where the notice states that the defendants are the owners, this section authorizes the construction that the defendants were the owners at the time the materials were furnished; and where the notice states that defendants *were* the owners the section authorizes the construction that the defendants are still the owners.

It is next contended that the notice is fatally defective because it claims a lien upon five different buildings situated on different lots and does not designate the materials furnished or used for each building. The statute at § 5907, Bal. Code, authorizes liens of this kind. It says:

"In every case in which one claim is filed against two or more separate pieces of property owned by the same person, or owned by two or more persons who jointly contracted for labor or material, for which the lien is claimed, the person filing such claim must designate in the claim the amount due him on each piece of property, otherwise the lien of such claim is postponed to other liens. The lien of such claim does not extend beyond the amount designated as against other creditors having liens upon either of such pieces of property."

The penalty for not designating the amount due on each piece of property is the postponement of the general lien to other liens which do designate the amount due upon a specific property. The effect is not to invalidate the lien notice or the lien. There is no contest of priorities in this case. The contract for the erection of all the houses upon all the lots was one contract. The lien was clearly authorized under the statute. *Wheeler etc. v. Ralph*, 4 Wash. 617, 30 Pac. 709; *Sullivan v. Treen*, 13 Wash. 261, 43 Pac. 38; *Phillips v. Gilbert*, 101 U. S. 721, 25 L. Ed. 833.

It is next claimed that the lien notice was not filed in time. The complaint alleges that,

"Within ninety days subsequent to the last delivery of said lumber, to wit, on the 4th day of August, 1902, said plaintiff caused to be executed a certain notice and claim of lien . . . a copy of which notice of lien is hereto attached, marked Exhibit A, hereby referred to and made a part of this complaint. (6) That on the same day, to wit, on the 10th day of March, 1902, the said plaintiff caused the said notice and claim of lien to be filed," etc.

The copy of the notice attached shows that it was filed

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on August 4, 1902. The complaint shows that the furnishing of materials began on March 19, and ceased on May 6, 1902. The date alleged as March 10, 1902, was therefore prior to the time when any of the materials were furnished. So that it clearly appears on the face of the complaint that the date, March 10th, was a clerical error. Ninety days from May 6, 1902, was August 4. The plaintiff had all that day in which to file his claim. He filed it on that day, and therefore in time. The complaint being sufficient upon these points, the lower court erred in sustaining the demurrer.

The judgment is therefore reversed, and the cause remanded for further proceedings.

FULLERTON, C. J., and HADLEY, DUNBAR, and ANDERS, JJ., concur.

[No. 4784. Decided January 2, 1904.]

J. CLYDE HILL, *Appellant*, v. NORTHERN PACIFIC RAILWAY Co., *Respondent*.¹

CARRIERS—LIMITING LIABILITY—CONTRACT TO CARRY FREIGHT AT REDUCED RATE—VALIDITY—PUBLIC POLICY. A contract for the transportation of household goods providing that the "released value of this shipment is agreed to be \$5.00 per 100 lbs.," and releasing the company from any and all damages while in transit, except the result of collisions of trains or of cars being thrown from the track, limits the liability to said sum, and is not void as against public policy upon the principle that a common carrier can not relieve itself from its common law liability, where the undisputed testimony shows that the contract was entered into with the special understanding that the rate of freight was less than the ordinary rate, and would have been one and one-half times higher where there was no limitation of value placed upon the goods.

¹Reported in 74 Pac. 1054.

SAME—RELEASED VALUE OF GOODS SHIPPED—CONSTRUCTION. In such a case the clause restricting the "released value" means the valuation to which the liability of the carrier is limited, and no distinction is to be made between a "released value" and the real valuation, upon the ground that it is arbitrarily fixed by the carrier, or is not calculated to approach the real value of the goods.

Appeal by plaintiff from a judgment of the superior court for Snohomish county, Denney, J., entered February 18, 1903, upon the verdict of a jury rendered by direction of the court for the amount admitted by defendant to be due. **Affirmed.**

E. D. Terrill (Cooley & Horan, of counsel), for appellant. The contract limiting the liability of the carrier to \$5 per hundred pounds was void as against public policy *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36, 8 South. 62; *Alabama etc. R. Co. v. Little*, 71 Ala. 611; *Black v. Goodrich Transp. Co.*, 55 Wis. 319, 13 N. W. 244. The contract is void since the expressed consideration is the receipt of property to be transported by a common carrier. 2 Am. & Eng. Enc. Law, p. 787, (1st ed.); 6 id. pp. 750, 767 (2d ed.). There was no freedom of choice in the rates offered to appellant, and this is essential. *Atchison etc. R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148; *McFadden v. Missouri Pac. R. Co.*, 92 Mo. 343, 4 S. W. 689, 1 Am. St. 721. The stipulated value must be a fair valuation of the goods. *Louisville etc. R. Co. v. Gilbert*, 88 Tenn. 430, 12 S. W. 1018, 7 L. R. A. 162. By the weight of authority it is impossible for a carrier to limit its liability for negligence. *Milton v. Denver etc. R. Co.*, 1 Colo. 307, 29 Pac. 22; *Georgia Pac. R. Co. v. Hughart*, 90 Ala. 36, 8 South. 62; *Hull v. Chicago etc. R. Co.*, 41 Minn. 510, 43 N. W. 391; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174, 23 L. Ed. 872. "Any and all damage" is construed not to include negligence. *Magnin*

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v. *Dinsmore*, 56 N. Y. 168; *Westcott v. Fargo*, 61 N. Y. 542. The evidence showed that the car left the track and this was proof of negligence. *Lawson*, Presumptive Evid., 126, 129, 130; *Peterson v. Seattle Traction Co.*, 23 Wash. 615, 63 Pac. 539, 65 Pac. 543, 53 L. R. A. 586; *Browning v. Goodrich Transp. Co.*, 78 Wis. 391, 47 N. W. 428; *Wilson v. California Cent. R. Co.* 94 Cal. 166, 29 Pac. 861. The leading case of *Hart v. Pennsylvania R. Co.* 112 U. S. 331, 28 L. Ed. 717, 5 Sup. Ct. 151, is distinguished in many cases where the agreed valuation was not a fair or reasonable one. *Ells v. St. Louis R. Co.*, 52 Fed. 903; *Schwarzchild v. National S. S. Co.*, 74 Fed. 257; *Kansas City etc. R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104; *Pacific Express Co. v. Foley*, 46 Kan. 457, 26 Pac. 665; *Black v. Goodrich Transp. Co.*, *supra*; *Rosenfeld v. Peoria etc. R. Co.*, 103 Ind. 121, 2 N. E. 344, 53 Am. Rep. 500. Such stipulations are not binding in case of negligence. *McCune v. Burlington etc. R. Co.*, 52 Iowa 600, 3 N. W. 615; *Baughman v. Louisville etc. R. Co.*, 94 Ky. 150, 21 S. W. 757; *Chicago etc. R. Co. v. Witty*, 32 Neb. 275, 49 N. W. 183; *Louisville etc. R. Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311; *Louisville etc. R. Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837; *Georgia R. etc. Co. v. Keener*, 93 Ga. 808, 21 S. E. 287; (in which the facts are identical with the facts here, and the *Hart* case is distinguished.) The clause in question was not conclusive, being, under the facts, within the rule of *Sayles v. New York etc. R. Co.*, 81 Fed. 326.

B. S. Grosscup and *A. G. Avery*, for respondent.

DUNBAR, J.—This is an action at law for the recovery of \$278.55, the alleged true value of certain household goods shipped from Tacoma, Washington, to Everett, Washington, over respondent's railroad, and which were

lost in transit. The complaint is the ordinary complaint in such actions, alleging the value of the goods lost to be \$278.55. The answer admits the shipment of the goods, but pleads that they were shipped under a certain contract in which the agreed value of the goods was \$5 per hundred pounds. The contract upon which the defense is based is as follows:

"NORTHERN PACIFIC RAILWAY COMPANY
Property Release.

Tacoma, 2-7, 1902.

Consigner and Destination.	Description of Articles.
J. C. Hill	H. H. Goods
Everett	Released Value of this shipment
Wash.	is agreed to be 5.00 per 100 lbs.

In consideration of the Northern Pacific Railway Company having received the above property from R. C. Bulger consigned to J. C. Hill, to be transported from Tacoma Station to Everett Station, I hereby release said company, and each and every other Railroad over whose Lines said Goods may pass to destination, from any and all damage that may occur to said Goods arising from leakage or decay, chafing or breakage, damage by fire while in transit or at Stations, loss of damage from effect of heat or cold, or from any other cause not the result of collisions of trains, or of cars being thrown from the track while in transit. And I further guarantee to said Company or other Railroad Companies, that any and all freight or other necessary charges that may accrue as provided by tariffs of said Road or Roads, shall be paid by consignee within twenty-four hours after arrival of said Goods at destination, and in case such charges are not so paid, the said Company or Company holding said Goods may send them to warehouse, or sell them for charges, without further recourse to me. I do also release said Company from all loss or damage that may occur to any freight shipped

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by me, above entered, after it has been unloaded from the cars at —— Station on their line.

Witness, W. G. Bassett.

R. C. Bulger, Shipper.”

Respondent ascertained the number of pounds shipped, and tendered \$19.25, the sum which it alleged to be due under such contract. At the close of the evidence the court directed a verdict against the defendant for \$19.25, upon which judgment was entered, and from which judgment this appeal is prosecuted.

The appellant contends that the contract is void for the reasons, (1) that it is contrary to public policy, and (2) that it is without consideration. It is well established, we think, by judicial decision, that a common carrier cannot relieve itself by contract from its common law liability for damages to, or loss of, goods consigned to it. But it does not seem to us that that question is involved in this case. It is simply the question of whether the carrier and shipper have a right to stipulate or agree in advance of the shipment concerning the value of the goods shipped, and it seems to us that this question was squarely decided in *Hart v. Pennsylvania R. Co.*, 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717, where it is held that where a contract of carriage signed by the shipper is fairly made with a railroad company, agreeing on a valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.

There the contract was entitled, “Limited Liability Live-Stock Contract for United Railroads of New Jersey Divis-

ion, No. 206," and it was agreed that the shipper had delivered to the company into its safe and suitable cars, one car, 5 horses, upon the following terms and conditions: First, that the shipper was to pay freight thereon to said company at the rate of ninety-four cents per hundred pounds, and the carrier assumed liability as follows: If horses or mules, not exceeding \$200 each (with some other provisions which are not pertinent). One of the horses was killed and it developed that they were race horses, and suit was brought against the company for the recovery of the alleged value of the horse at \$15,000, together with damages for \$3,000 for the injury to another horse, and \$3,500 for the injury to still another. It was admitted by the defendant that the damages sustained by the plaintiff were equal to the full amount expressed in the bill of lading, and the court instructed the jury that the amount recovered could not exceed the value expressed in the bill of lading. This case was appealed and finally reached the supreme court of the United States, where the judgment was affirmed, the supreme court in the course of its opinion saying:

"The presumption is conclusive that, if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The rate of freight is indissolubly bound up with the valuation. If the rate of freight named was the only one offered by the defendant, it was because it was a rate measured by the valuation expressed. If the valuation was fixed at that expressed, when the real value was larger, it was because the rate of freight named was measured by the low valuation. The plaintiff cannot claim a higher valuation, on the agreed rate of freight."

The same thing may be said in this case. In addition to the fact that the presumption may be considered conclusive that, if the liability had been assumed on a valua

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tion as great as that now alleged, a higher rate of freight would have been charged, the undisputed testimony shows that this contract was entered into with the especial understanding, and in accordance with the general rule of the company, which was made known to all shippers, that the contract under which the goods were shipped was a contract for a less rate than the ordinary contract where there was no limitation of value placed upon the goods, the testimony showing that the ordinary shipping rates were one and one-half times larger than the rates charged on this limited valuation way bill. The court stated in that case that it was the law of that court that a common carrier might, by special contract, limit his common law liability, but that he could not stipulate for exemption from the consequences of his own negligence or that of his servants, and many cases are cited to sustain the conclusion reached, and the qualification on the prohibition against common carriers to escape the common law liability was justified in the following language:

“There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is a less sum than that claimed after loss. It is just to hold the shipper to his agreement, fairly made, as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and been told by the plaintiff the sum inserted in the contract.”

And certainly that is the agreement of the value in the case at bar, for the words, “Released value of this ship-

ment is agreed to be \$5.00 per 100 lbs." are as easily understood to be a valuation to which the liability of the company is limited as was the agreement in the case under discussion by the supreme court of the United States. The limitation as to value when fairly agreed upon, it seems to us, can work no injury to either party. If the goods are successfully transported, the shipper is benefitted by the agreement which he entered into; if they are lost, the carrier is benefitted by such agreement; and, as said by the court in the Hart case:

"There is no violation of public policy; on the contrary it would be unjust and unreasonable and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

It is useless to enter into an analysis of all the cases on this subject. A great majority of the cases are collated in the case we have just mentioned, and are ably analyzed, and the law announced in that case has been recognized in nearly all the jurisdictions in the United States as the established law on this subject. It is asserted in the reply brief of the appellant that he does not dispute the rule announced in that case, but that the courts, while recognizing the rule therein laid down, have almost as universally drawn a sharp distinction between a case where there was an agreed valuation and the case where the value was arbitrarily fixed by the carrier, or where the value inserted was a released valuation, not calculated to be or to approach the real value of the goods. An examination of the cases cited we do not think sustains this contention, and even where there has been an attempt to make this distinction it has been in principle a failure. The contract establish-

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ing the released valuation must be construed to embrace the real valuation. At all events it is the valuation agreed upon between the shipper and the carrier as a basis of charges for transportation, and upon which agreed liability is based. The case of *Black v. Goodrich Transportation Co.*, 55 Wis. 319, 13 N. W. 244, 42 Am. Rep. 713, a case which it is claimed makes the distinction contended for by the appellant even while recognizing the doctrine announced in the Hart case, was based upon an entirely different contract from the one here under discussion. In that case the contract is so meagerly set forth that we can only judge of its entirety by what was said by the court, the court in that case saying:

"The courts all seem to hold that a carrier will not be held to have limited his liability against his own or his agent's negligence unless his contract expressly so provides. In interpreting his contract it will not be so construed except upon the plain language of the contract. If the words stamped upon this contract can be construed into a contract to limit the liability of the appellant to the sum of \$20 in case of loss, it must be so construed as to limit such liability only in case of loss without the fault of the appellant, his agent or servants."

But this question is eliminated from the contract under discussion by the very terms of the contract itself, for it specifically releases the company from responsibility for any other damages than those occurring as the result of collisions of trains, or from cars being thrown from the track while in transit. In this case the damage was due to the cars running into a slide. In any event, there is no testimony showing that the damage was caused by collision of trains, or by cars being thrown from the track while in transit.

We think under the testimony in this case, in consideration of the contract entered into, that the court properly

instructed the jury, and the judgment will therefore be affirmed.

FULLETON, C. J., and HADLEY, ANDERS, and MOUNT, JJ., concur.

[No. 4406. Decided October 27, 1902.]

EMORY E. HOSKINS, *Respondent*, v. OLIVER P. BARKER, *as Executor etc., et al., Appellants*.¹

Appeal from a judgment of the superior court for Walla Walla county, Chadwick, J. Affirmed.

Gills & Reynolds and *C. B. & Wm. H. Upton*, for appellants.

W. T. Dovell and *Lester S. Wilson*, for respondents.

PER CURIAM.—This cause is in all respects similar to the case of *Demaris v. Barker* (ante p. 200) just decided—in fact brought here upon the same record—and what is said in that case disposes of the questions suggested in this one.

Affirmed.

[No. 4800. Decided November 14, 1902.]

E. H. WINCHESTER *et al., Respondents*, v. EVAN J. MORRIS, *Appellant*.²

Appeal from a judgment of the superior court for Chelan county, Martin, J. Dismissed.

Dill & Crass, for appellant.

Hovey & Hale, Kauffman & Frost, and *Frank Reeves*, for respondents.

PER CURIAM.—The respondents move to dismiss the appeal in this case, for the reason that the appeal bond, which was intended to operate also as a supersedeas bond, is insufficient in the amount of the penalty named. The judgment from which the appeal is

¹Reported in 74 Pac. 1135.

²Reported in 74 Pac. 361.

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taken is \$293.87 and costs. The penalty named in the bond is \$700. This, it will be seen, is not twice the amount of the judgment and the \$200 which is required in an appeal bond. Under the rule announced in *Town of Sumner v. Rogers*, 21 Wash. 361, 58 Pac. 214, that a bond, on appeal, to act as both a cost bond and a supersedeas, must be in a penalty double the amount of the money judgment entered plus \$200, which rule has since been uniformly sustained by this court, the motion must prevail, and the appeal be dismissed.

[No. 4792. Decided November 22, 1903.]

F. H. HAWTHORN *et al.*, *Appellants*, v. WASHINGTON & GREAT WESTERN RAILWAY COMPANY, *Respondent*.¹

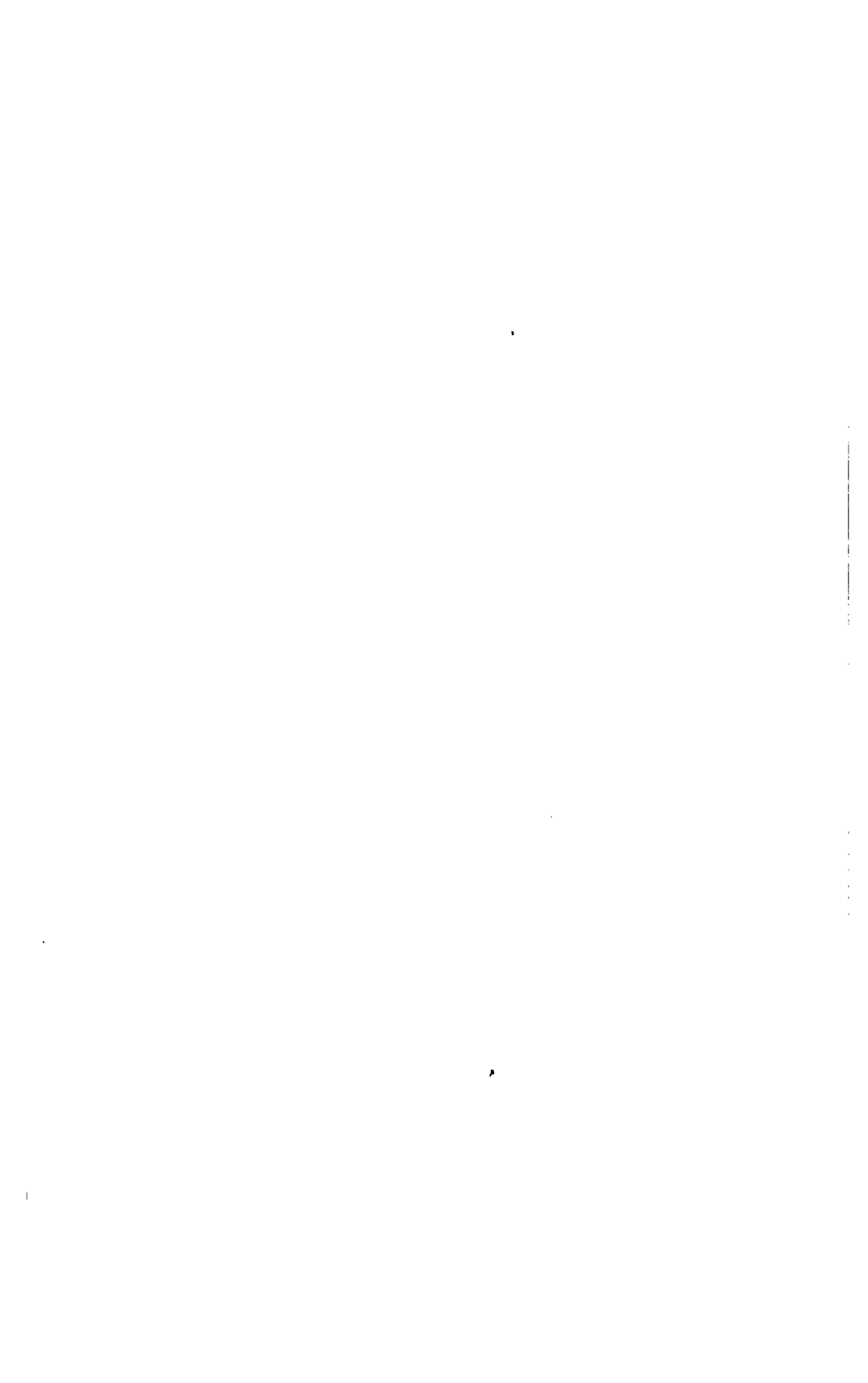
Appeal from a judgment of the superior court for Ferry county, Neal, J. Dismissed.

Peter McPherson, for appellants.

M. J. Gordon and *C. A. Murray*, for respondent.

PER CURIAM.—Respondent moves to dismiss the appeal in this case for the reason that the bond, which purports to be both an appeal and stay bond, is not in double the amount of the judgment and \$200, the amount required to be given on an appeal bond. An examination of the bond brings the case within the rule announced in *Town of Sumner v. Rogers*, 21 Wash. 361, 58 Pac. 214, and the uniform rulings of this court since. The motion will be sustained and the cause dismissed.

¹Reported in 74 Pac. 1135.



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1. **APPEARANCE—SPECIAL OR GENERAL.** After the overruling of a motion to quash the service of a summons, an answer filed without any mention of the previous special appearance, is a general appearance in the case, under Bal. Code, § 4886. *Morris v. Healy Lumber Co.*..... 451

ARCHITECT:

— Lien for services. See **MECHANIC'S LIENS**, 1, 2.

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— Liability for. See **MUNICIPAL CORPORATIONS**, 10-12.

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- Of taxes. See TAXATION, 1-4.

ASSIGNMENT:

- Of mortgage, when deed of mortgagee is not. See MORTGAGES, 1.
- Of rents to mortgagee, construction. See CONTRACTS, 4.
- Of rents, validity. See EJECTMENT, 3.

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- Membership, expulsion. See BENEFICIAL ASSOCIATIONS.

ASSUMPTION OF RISKS:

- See MASTER AND SERVANT, 8, 10-12.

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- Of nonresident witness. See WITNESSES, 1.
- Wrongful, action for. See CONVERSION, 1.

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- See CRIMINAL LAW, 4.

ATTORNEY AND CLIENT:

- Authority to appear. See JUDGMENTS, 3, 4.
- Authority to contract for firm. See PARTNERSHIP, 1, 2.
- Authority to compromise suits, objection when to be raised. See APPEAL AND ERROR, 36.

1. **ATTORNEY AND CLIENT—EMPLOYMENT BY ADVERSE PARTIES.** An attorney should not be excluded from appearing in behalf of the plaintiff in an action for damages for the taking of exempt personal property under an attachment sued out by defendant, by reason of having previously represented the defendant, when it appears that he had simply been consulted as defendant's general counsel with reference to the collection of the original account, and was not employed in the attachment suit subsequently brought to collect it, and it does not appear that any facts were disclosed which he could use prejudicially to defendant's rights. *Messenger v. Murphy*..... 353

BANKS:

- Embezzlement of funds, proof of insolvency. See CRIMINAL LAW, 22. *State v. Dix*..... 406

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1. **BENEFICIAL SOCIETIES—ACTION ON POLICY—FRAUD IN OBTAINING MEMBERSHIP—FALSE APPLICATION—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.** In an action upon a beneficiary certificate in a mutual society where the defense is that the policy was void on account of false statements as to the deceased member's physical condition, and as to his rejection on a former application for life insurance, a nonsuit is properly refused where the only proof of fraud is evidence of contrary statements by the deceased upon a former application to a different lodge of the same order, which was rejected, and where the proof further shows that deceased understood and spoke English imperfectly, and did not himself write the former answers, and may have misapprehended their import. *Dubcich v. Grand Lodge A. O. U. W.*..... 651
2. **SAME.** It is also a question for the jury whether the defendant did not have knowledge, or means of knowledge, of the former answers, where it appears that both applications were forwarded by the local lodges to the same central authority, and were in its possession for a year and a half. *Id.*..... 651
3. **BENEFICIAL SOCIETIES—MEMBERSHIP—EXPULSION—RULES OF SOCIETY—CONSTRUCTION.** In an action on a mutual benefit certificate defended on the ground that the member had been expelled for false statements in securing membership, the rules of the society introduced in evidence are to be construed by the court to determine whether they conferred jurisdiction to expel upon mailed notice at a time when the member was insane. *Id.*..... 651
4. **SAME—JURISDICTION OF THE COURTS.** In such a case the courts may inquire into the proceedings of the society expelling a member, to determine whether the procedure was fairly conducted under the laws of the society. *Id.*..... 651
5. **SAME—NOTICE OF HEARING—SUFFICIENCY WHERE MEMBER IS UNDER DISABILITY.** A mutual benefit society acquires no jurisdiction to enter an order of expulsion on the ground of fraud in securing membership, where at the time of mailing the notice of the hearing, the member is insane, and in a hospital incapable of being present, especially when, before the hearing, knowledge was brought to the society that he was unable to be present and insane; unless, at least, it clearly and unmistakably appears that the laws of the society authorize such a notice. *Id.*..... 651
6. **SAME.** A notice by mail of the hearing of charges of fraud in procuring membership in a mutual benefit society, upon which a member is to be expelled, do not stand upon the same footing as a charge of nonpayment of dues, and is not authorized by the laws

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of a society that do not expressly provide for a mailed notice upon such a charge. *Id.*..... 651

7. **SAME—ACTION ON POLICY—DEFENSES—UNAUTHORIZED EXPULSION—REMEDY OF BENEFICIARY.** In an action on a mutual benefit certificate, where the society relies upon an expulsion which was entered against the deceased member while insane, and without jurisdiction, and his death occurs before he can take an appeal, and the beneficiary has no right of appeal, and she offers arbitration (her only remedy in the society), which is refused, an action in the courts is maintainable and a challenge to the sufficiency of the evidence is properly overruled. *Id.*..... 651

BICYCLES:

- License and regulation. See **MUNICIPAL CORPORATIONS**, 11, 12.

BILL OF EXCEPTIONS:

See **APPEAL AND ERROR**.

BILL OF PARTICULARS:

- Not part of information. See **CRIMINAL LAW**, 7, 8.

BOOM COMPANY

- Power to condemn property. See **EMINENT DOMAIN**, 4.
- Action to recover boom site. See **RECEIVERS**, 1-3.

BONDS:

- On appeal. See **APPEAL AND ERROR**, 14-17.
- Limitation of suit on. See **LIMITATION OF ACTIONS**, 1.
- Power of agent to execute indemnity bond, construction, agent acting for both parties, ratification. See **PRINCIPAL AND AGENT**, 1-5.
- To indemnify city against negligence of contractor. See **INDEMNITY**, 4-7.

BRIDGES:

1. **NEGLIGENCE—BRIDGES—LACK OF GUARDRAILS—DEATH BY WRONGFUL ACT—PROOF OF CAUSE OF DEATH—FAILURE OF PROOF—VERDICT NOT SUSTAINED WHEN BASED ON CONJECTURE.** In an action for the death of a person alleged to have fallen from a bridge negligently maintained without any guardrails, there is a total failure of proof as to the cause of the death, and a verdict for plaintiffs is not warranted where it appears that the deceased left his team stand-

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ing in the road the evening before to return some distance for a whiffetree, that the team wandered from the road down the stream without crossing the bridge, that deceased's body was found partly underneath the bridge up the stream, and the whiffetree four feet further up the stream, that deceased was familiar with the bridge, and that a person could approach the stream above the bridge and walk in the ravine beneath the same; since it is equally plausible and consistent with the testimony that he met his death other than by falling from the bridge, and the same cannot be left to conjecture or speculation. *Reidhead v. Skagit County* 174

BRIEFS:

See **APPEAL AND ERROR**, 30.

BROKERS:

— Attempted rescission by. See **SALES**, 4-7.

BOUNDARIES:

— Of land on navigable lake. See **WATERS**, 1.

CANCELLATION OF INSTRUMENTS:

— Of state lease, when unauthorized. See **PUBLIC LANDS**, 5-12.

1. **RESCISSION—NECESSITY OF TENDER—WAIVER BY FAILING TO DEMUR.** In an action in the nature of rescission of a contract to recover money paid on fraudulent representations, the objection that the plaintiff had not offered to surrender a mortgage given under the contract should be taken by demurrer to the complaint, and is too late after trial and verdict on the merits. *Brown v. Gillett* 264

CARRIERS:

— Contract for transporting goods, construction. See **CONTRACTS**, 1.

1. **CARRIERS—LIMITING LIABILITY—CONTRACT TO CARRY FREIGHT AT REDUCED RATE—VALIDITY—PUBLIC POLICY.** A contract for the transportation of household goods providing that the "released value of this shipment is agreed to be \$5.00 per 100 lbs.," and releasing the company from any and all damages while in transit, except the result of collisions of trains or of cars being thrown from the track, limits the liability to said sum, and is not void as against public policy upon the principle that a common carrier

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can not relieve itself from its common law liability, where the undisputed testimony shows that the contract was entered into with the special understanding that the rate of freight was less than the ordinary rate, and would have been one and one-half times higher where there was no limitation of value placed upon the goods. *Hill v. Northern Pac. R. Co.*..... 697

2. **SAME—RELEASED VALUE OF GOODS SHIPPED—CONSTRUCTION.** In such a case the clause restricting the "released value" means the valuation to which the liability of the carrier is limited, and no distinction is to be made between a "released value" and the real valuation, upon the ground that it is arbitrarily fixed by the carrier, or is not calculated to approach the real value of the goods. *Id.* 697

CAVEAT EMPTOR:

- Rule applies when. See **EXECUTORS AND ADMINISTRATORS**, 10. EJECTMENT, 3-5.

CERTIORARI:

1. **WRIT OF REVIEW—ATTESTATION.** A writ of review issued by order of court upon the showing required by statute, and sealed and attested by the clerk, is sufficient without attestation by the judge. *Corbett v. Civil Service Com'n of Seattle*..... 190
2. **SAME—APPLICATION—SPECIFICATION OF ERRORS—DEMURRER.** A demurrer to an application for a writ of review on the ground that the errors are not specifically pointed out is properly overruled when it is sufficient to apprise the party of the errors, and a motion to make more definite was not made. *Id.* 190

CHATTEL MORTGAGES:

1. **CHATTEL MORTGAGE—FORECLOSURE—RIGHT TO CONTEST—COMPLAINT—SUFFICIENCY.** A complaint by the receiver of an insolvent corporation to restrain the foreclosure of a chattel mortgage by sheriff's notice, under Bal. Code, § 5876, authorizing any party interested to contest the right to foreclose as well as the amount due, is demurrable for want of sufficient facts when it merely states that the receiver, after diligent inquiry, is unable to state whether the mortgage is valid, or how much of the debt is due, and desires to contest the same, without alleging facts showing that the mortgagees had no right to foreclose, or that the amount claimed is not due. *Kidder v. Beavers*..... 635
2. **SAME—FRAUDULENT SALE BY OFFICERS OF CORPORATION.** In such a case, the fact that the officers of the company had fraudulently

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sold the property to third persons, who were in possession, does not warrant the court in restraining the foreclosure where the mortgage was valid and past due. *Id.* 635

3. **SAME—RECEIVERS—LEAVE OF COURT TO FORECLOSE CHATTEL MORTGAGE.** A mortgagee of personal property belonging to an insolvent corporation in the hands of a receiver is not required to obtain leave of court to foreclose the mortgage by sheriff's notice, where the property is in the possession of third persons claiming to have purchased it, and the receiver had never been in actual or constructive possession thereof. *Id.* 635
4. **RECEIVERS—RIGHT TO POSSESSION OF PROPERTY—CHATTEL MORTGAGES.** Where a receiver of an insolvent corporation claims an interest in mortgaged chattels which were never in the possession of the corporation, he can acquire possession only by one of the methods that might have been pursued by the corporation; and the mortgagee, if a stranger to the action, may seize any property not in the possession of the receiver. *Id.* 635

CITY AND CITY OFFICERS:

See **MUNICIPAL CORPORATIONS.**

CIVIL SERVICE COMMISSION:

— Appeal by, bond. See **APPEAL AND ERROR, 21.**

COLOR OF TITLE:

See **ADVERSE POSSESSION, 1.**

COMMISSIONER:

- Report of, how brought up. See **APPEAL AND ERROR, 27.**
- Of Public Lands, power to cancel lease. See **PUBLIC LANDS, 5-12.**

COMMUNITY PROPERTY:

1. **HUSBAND AND WIFE—DIVISION OF COMMUNITY PROPERTY BY CONSENT—ACTION TO SET ASIDE—SUFFICIENCY OF EVIDENCE.** In an action by a divorced wife for a division of community property, a finding that the same was fairly divided by mutual consent before the decree, is supported by evidence of the husband that she received property of the value of \$192,000, while he received but \$171,000, although the wife testifies that she received the above as gifts and claims half of the balance, and that the husband received \$37,000 more than she received. *Turner v. Turner*..... 118

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2. **COMMUNITY PROPERTY—ORAL SALE BY HUSBAND—POSSESSION OF PURCHASER—PAYMENT—NOTICE TO WIFE PRESUMED—SPECIFIC PERFORMANCE.** Where a husband and wife are in the actual possession of community realty, and place a purchaser in possession under an oral agreement of sale made by the husband alone, the consideration paid by the purchaser is presumed to move to the community and the assent of the wife is presumed until the contrary is made distinctly to appear; and specific performance may be decreed without showing the wife's knowledge of the oral agreement, where there is nothing to overcome such presumption. *O'Connor v. Jackson* 219
3. **COMMUNITY PROPERTY—MORTGAGE BY WIFE ALONE—FORECLOSURE—DEFENSE TO EJECTMENT—AFFIRMATIVE RELIEF NOT GRANTED WHEN.** The foreclosure of a mortgage of community property, made by the wife alone, conveys no title, and affirmative relief, quieting the title thereunder, cannot be given to defendants, relying thereon in an action to recover possession, upon dismissing the action for failure of plaintiff's title. *Humphries v. Sorenson*. 563

COMPROMISE:

- Ratification by using money paid. See **APPEAL AND ERROR**, 22.

1. **SAME—STATUTE OF FRAUDS—MEMORANDUM.** Where a somewhat indefinite memorandum of settlement has been acted upon, and benefits constituting the consideration have been received, a party is estopped from asserting that it is not such as can be enforced by specific performance, or that it is within the statute of frauds. *Collins v. Fidelity Trust Co.* 136

CONDEMNATION:

- See **EMINENT DOMAIN**.
— By aliens. See **ALIENS**, 2-3.

CONDITIONAL SALE:

- See **VENDOR AND PURCHASER**, 1.

CONSPIRACY:

- To embezzle, evidence of. See **CRIMINAL LAW**, 21, 22.

CONSTITUTIONAL LAW:

- Due process, taking private property. See **EMINENT DOMAIN**, 1-6; **FORCEFUL ENTRY AND DETAINER**, 6.

CONSTITUTIONAL LAW—CONTINUED.

- Jury trial, restrictions on. See **JURY**, 1, 2.
- Requirement that decision be rendered in ninety days. See **COURTS**, 1.

CONTINUANCE:

- See **TRIAL**, 1.

CONTRACTS:

- Administrator, waiving fees. See **EXECUTORS AND ADMINISTRATORS**, 1-4.
 - Attorneys, for benefit of firm. See **PARTNERSHIP**, 1, 2.
 - Architect, for services. See **MECHANICS' LIENS**, 1-3; **PLEADINGS**, 9.
 - Carriers, limiting liability. See **CARRIERS**, 1, 2.
 - City, for street improvements. See **MUNICIPAL CORPORATIONS**, 13-15.
 - Construction of ship, authority of agent. See **PRINCIPAL AND AGENT**, 1, 2.
 - Corporation, evidence of. See **CORPORATIONS**, 1.
 - Engineer's estimates of lumber sold. See **SALES**, 10.
 - Husband and wife. See **COMMUNITY PROPERTY**.
 - Indemnity, authority, construction, representations. See **INDEMNITY**, 1, 3, 8.
 - Performance within one year. See **FRAUDS, STATUTE OF**, 1.
 - Railway subsidy. See **SUBSCRIPTIONS**, 1.
 - Rescission for fraud. See **CANCELLATION OF INSTRUMENTS**, 1.
 - Sales of goods, validity. See **SALES**, 1.
 - Sale of land. See **VENDOR AND PURCHASER**, 1, 2.
1. **CONTRACTS—LATENT AMBIGUITY—CONSTRUCTION—WHEN QUESTION FOR JURY.** Where a contract with an Alaska transportation company gave plaintiff the exclusive hauling of all its freight to A, specifying price and conditions, and required plaintiff to have on hand a large equipment therefor (which part plaintiff performed) and contained the further clause that in case of the falling off of freight to A the plaintiff should have the "preference over others in hauling freight to B or other points;" and it appears that at the time of the execution of the contract the Canadian government was agitating the exclusion of aliens at A which would, and shortly did, result in the falling off of freight to A, the clause for preference right in hauling to B is not void for uncertainty or indefiniteness, but is within the rule that the construction of a written contract is for the jury and not the

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- court where a latent ambiguity is produced by extrinsic facts, showing the intent of the parties, or requiring construction by persons experienced in the calling engaged in. *Durand v. Heney* 38
2. CONTRACTS—ABROGATING BY NEW AGREEMENT—BURDEN OF PROOF—DAMAGES. While the burden is upon the defendants to show a new agreement abrogating a contract for the purchase of brick of certain quality at a specified price, whereby an inferior quality at a fair price was substituted, the difference in price need not be shown with absolute precision, nor would the damages be restricted to the increased cost of laying the inferior brick, since compensation is the fundamental principle of damages. *Kruegel v. Kitchen* 214
3. WAREHOUSEMAN—LOSS OF GOODS—CONTRACTS BY TELEPHONE—EVIDENCE—SUFFICIENCY. In an action for the value of a trunk claimed to have been stored with a transfer company, a verdict for the plaintiff is not supported by any evidence where the only proof tending to show the receipt of the trunk was the fact of a telephone order for its removal and storage, given to defendant's number and answered by an unidentified person who stated it was the defendant, and that an unidentified expressman removed the trunk. *Young v. Seattle Transfer Company*..... 225
4. MORTGAGEE IN POSSESSION—CONTRACT FOR APPLICATION OF RENTS—CONSTRUCTION. Where the owners of mortgaged premises surrendered possession thereof under a written assignment of the rents to be applied (1) to the repayment of disbursements for insurance, taxes, and repairs paid or to be paid by the mortgagee, and (2) to the payment of all arrears of interest "due," the agreement is to be construed as prospective and covers the interest subsequently falling due, in view of the circumstance that the owners suffered the mortgagee to remain in possession and apply the rents to subsequent interest for years after the agreement was made. *Peterson v. Philadelphia Mtg. etc. Co.*..... 464

CONTRIBUTORY NEGLIGENCE:

- Of servant. See. MASTER AND SERVANT, 8.
- Of pedestrian in street. See MUNICIPAL CORPORATIONS, 19.

CONVERSION:

- By warehouseman, evidence of contract by telephone. See CONTRACTS, 3.
1. CONVERSION—WRONGFUL ATTACHMENT—SEIZURE OF EXEMPT PROPERTY—CLAIM OF EXEMPTIONS—SALE WITHOUT APPRAISEMENT. An execution plaintiff and the officer executing the writ, who ignore

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- a claim for exemptions and proceed to sell without an appraisal, should respond in damages for the conversion of plaintiff's exempt property, seized and sold under an attachment issued on the theory that plaintiff was a nonresident; and a verdict for plaintiff will not be disturbed where there was sufficient evidence to justify the jury in finding that the plaintiff was a resident householder, that the property came within the classification of exempt property, and that claim to the exemption was duly made under Bal. Code, § 5255, prior to the sale. *Messenger v. Murphy.* 353
2. DAMAGES FOR CONVERSION—VALUE OF GOODS—VERDICT WHEN NOT EXCESSIVE. A verdict for \$479.90 for damages for the wrongful attachment and sale of exempt property will not be disturbed as excessive when the evidence is conflicting and the plaintiff testifies that it was of that value. *Id.* 353
3. SAME—GOODS PURCHASED ON THE INSTALLMENT PLAN—MEASURE OF DAMAGES. The purchaser of goods on the installment plan (the title remaining in the vendor) may recover the full value for their conversion, when the contract contains an unqualified agreement to pay the price. *Id.* 353

CORONER:

- Duty to hold inquest. See CRIMINAL LAW, 29.

CORPORATIONS:

- Charter, as evidence of authority. See PRINCIPAL AND AGENT, 2.
- Foreign, power to hold and condemn land. See ALIENS, 1-3.
- Fraudulent sale by officers, not ground to contest chattel foreclosure. See CHATTEL MORTGAGES, 2.
1. CORPORATIONS—CONTRACTS—SUFFICIENCY OF EVIDENCE. There is sufficient evidence to support a judgment against a corporation where it appears that the services were rendered at its instance, for its benefit, and under a contract made by its agent. *Meals v. De Soto Placer Min. Co.* 302
2. CORPORATIONS—POWERS—CONSTRUCTION OF ARTICLES—WATER RIGHTS OF MINING COMPANY. Where the articles of a mining company provide for carrying on many kinds of business including the acquiring of "water rights" and other appliances, all of which seem to center around the main object of mining and smelting ores, the words "water rights" have reference to some mechanical application thereof, and do not indicate an intention to form a water company for the purpose of supplying cities with pure fresh water, or authorize the company to acquire property by the right of eminent domain. *State ex rel. Morrell v. Superior Court.* 542

COSTS:

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1. **COSTS—TENDER—PAYING OUT OF DEPOSIT IN COURT.** In an action to foreclose a lien, where the defendants' tender has been paid into court, it is discretionary, in giving judgment against the plaintiff for costs, to order the same paid out of the deposit in court. *Kruegel v. Kitchen*..... 214

COUNTIES:

1. **PUBLIC LANDS—COUNTY PROPERTY—SALE BY COUNTY COMMISSIONERS—NOTICE—ERRONEOUS DESCRIPTION.** Bal. Code, § 306, providing that notice of sale of county lands by order of the county commissioners shall particularly describe the property, must be strictly complied with, and when the body of the notice designates the wrong block the sale is invalid, although the caption of the notice correctly states the block, since the caption is no part of the notice, and it is impossible to say that no one was misled by the error. *State ex rel. Willars v. McConnaughey*..... 571
2. **SAME—ERROR IN DESCRIPTION—ATTEMPT OF OFFICERS TO CORRECT AT TIME OF SALE.** In such a case the sale can not be rendered valid by any act of the officers at the time of making the sale, or by an agreement with the purchaser that the notice was erroneous and that a different tract was intended and sold. *Id.*.. 571

COURTS:

- Authority of judge to hold office. See **JUDGES**, 1, 2.
 - Jurisdiction of offenses by Indians. See **INDIANS**, 2.
 - Jurisdiction to try foreigners. See **CRIMINAL LAW**, 26.
 - Jurisdiction over nonresident witnesses. See **WITNESSES**, 1.
1. **COURTS—JUDGMENT—JURISDICTION—DECISION IN NINETY DAYS.** The failure of a judge to decide a case within ninety days from its submission, as required by const., art. 4, § 20, does not render the judgment void for want of jurisdiction. *Demaris v. Barker*.. 200
 2. **COURTS—VISITING JUDGES—POWERS OF.** The visiting judge has the same powers as the regularly elected judge of the county. *Id.* 200
 3. **COURTS—STATE OR FEDERAL—OBJECTION TO JURISDICTION—WHEN MAY BE RAISED.** An objection going to the jurisdiction of the state court to try a cause for the reason that the federal courts have exclusive jurisdiction of the offense and of the person of the accused may be raised for the first time in the supreme court. *State v. Howard* 250

CRIMINAL LAW:

- Challenge to jurors. See **JURY**, 3.
- Change of venue. See **VENUE**, 1, 2,

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- Jurisdiction of offense, when raised. See COURTS, 3.
- Offense by Indian. See INDIANS, 1, 2.

I. INFORMATION AND DEFINITIONS.

1. CRIMINAL LAW—INFORMATION—PROSECUTING ATTORNEY—DEPUTY. An information subscribed by a deputy prosecuting attorney is sufficient, since Bal. Code, § 6832, requiring informations to be subscribed by the prosecuting attorney, must be read in connection with the later act, Bal. Code, § 4756, providing that deputies shall have the same powers in all respects as their principals. *State v. Riddell* 324
2. HOMICIDE—MURDER IN THE FIRST DEGREE—INFORMATION—ALLEGING INTENT TO KILL—SUFFICIENCY. An information charging that the accused purposely and of his deliberate and premeditated malice, struck, cut, and mortally wounded the said B, from which said mortal wound said B died, sufficiently alleges an intent to kill, and supports a conviction of murder in the first degree; the intent to "mortally wound" importing *ex vi termini* an intent to kill. *State v. Champoux*..... 339
3. SAME—ALLEGING DEATH FROM WOUNDS—TIME OF DEATH—SHOWN BY DATE OF FILING INFORMATION. An information for murder charging that the deceased then and there languished, and languishing, died, sufficiently shows that deceased died within a year and a day from the infliction of the wounds mentioned; and if not, the defect is cured by the fact that the information was filed three days after the crime was committed. *Id.*..... 339
4. FALSE PRETENSES—ATTEMPTS—INFORMATION—SUFFICIENCY—PRETENDING OWNERSHIP OF CERTIFICATE. An information charging an attempt to secure money from a bank on a duly endorsed certificate of deposit by falsely pretending ownership thereof, which if successful would have defrauded the payee of the amount of the certificate, states an offense under Bal. Code, § 7165, defining false pretenses, and Bal. Code, § 7437, making attempts to commit any crime punishable, and whether the attempt was successful or not is immaterial. *State v. Riddell*..... 334
5. SAME—FAILING TO ALLEGE POSSESSION. Such an information is not objectionable for failing to allege that the accused was in possession of the certificate, where it is alleged that he falsely pretended to be its owner and bona fide purchaser for value. *Id.*..... 334
6. CRIMINAL LAW—LARCENY BY EMBEZZLEMENT—CONTINUING OFFENSE—INFORMATION—DUPLICITY. An information charging a bank president with larceny by embezzlement "on the 15th day of August, 1900, and on divers dates and days from thence con-

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- tinuously to the 10th day of January, 1901," of certain moneys and funds, amounting in the aggregate to a specified sum, is not demurrable for duplicity, but charges one continuing crime. *State v. Dix* 405
7. SAME—BILL OF PARTICULARS—DUPLICITY. A bill of particulars is not part of the information and even if it shows an intent to prove more than one crime, it does not render the information demurrable. *Id.* 405
8. SAME. A bill of particulars showing that on various dates, specific sums were intrusted to the president of a bank, and that on a certain date thereafter he failed to account for the respective sums or any part thereof, does not indicate that more than one offense was intended to be proved under an information charging the embezzlement of the aggregate amount on divers days and dates continuously during the period specified. *Id.* 405
9. SAME—AGE OF CONSENT—ALLEGING AGE—SUFFICIENCY. Charging the offense of rape upon a prosecutrix "of the age of sixteen years" sufficiently alleges that she was under the age of consent, eighteen years, as against objection first made after verdict. *State v. Fetterly* 599
- II. EVIDENCE.
10. INCEST—EVIDENCE OF PRIOR OFFENSES. In a prosecution for incest it is competent to prove acts of sexual intercourse between the parties occurring prior to the offense charged. *State v. Wood* 290
11. RAPE—PROSECUTRIX UNDER AGE OF CONSENT—EVIDENCE OF OTHER OFFENSES. In a prosecution for rape where the prosecutrix is under the age of consent, testimony of carnal intercourse between the parties at times other than the one charged is admissible. *State v. Fetterly* 599
12. SAME—INFORMATION—FORCE. Such rule is not changed by the charge of force in the information, as that is surplusage and does not change the nature of the proof required where the prosecutrix is under the age of consent. *Id.* 599
13. VENUE—SUFFICIENCY OF EVIDENCE—JUDICIAL NOTICE OF LOCATION OF CITY. Proof that the offense of rape was committed in a house at a certain street and number in the city of Seattle is sufficient proof of the venue, as the courts take judicial notice that Seattle is in King county, Washington. *Id.* 599
14. RAPE—PROOF OF MISCARRIAGE—COMPETENCY—CORROBORATION. In prosecution for rape of one under the age of consent, proof that the prosecutrix suffered a miscarriage within the period of gestation is competent to show that the crime had been com-

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- mitted, and as corroborative of the evidence of the prosecutrix that the defendant was the guilty party. *Id.* 599
15. SAME—CORROBORATION. The jury may convict for rape upon the uncorroborated testimony of the prosecutrix, when she testifies directly and positively to all the essential elements of the offense. *Id.* 599
16. LARCENY—RANGE ANIMALS—EVIDENCE OF CHARACTER OF ANIMAL. Evidence that a horse had been running at large upon land but partially inclosed in an open country where animals come and go at will sufficiently shows the animal to be within the classification of range animals. *State v. Eubank* 293
17. SAME—EVIDENCE—POSSESSION OF STOLEN PROPERTY. In a prosecution for larceny, recent possession is a circumstance to be considered by the jury along with other circumstances in evidence. *Id.* 293
18. LARCENY OF RANGE ANIMAL—RECENT POSSESSION—EVIDENCE OF —INSTRUCTIONS. Evidence that an animal was found in the possession of the defendant within a few months after it was permitted to run on the range, raises a question for the jury as to whether it was "shortly after," and warrants an instruction as to the usual presumption from "recent possession." *Id.* 293
19. SAME—EVIDENCE—SUFFICIENCY TO SUSTAIN CONVICTION FOR ATTEMPT TO DEFRAUD BY FALSE PRETENSES. There is sufficient evidence to sustain a conviction for attempting to obtain money by false pretenses, when it appears that the defendant early in the morning presented for payment at a bank a certificate of deposit that had on the same day been fraudulently secured by others in a bunco game, and which was duly endorsed by the payee, who was still the owner, that defendant claimed to be the owner for value at the time it was presented, but afterwards made a written statement disclaiming any interest in it, and made other contradictory statements concerning the description of the man from whom he claimed to have obtained it, bearing upon defendant's fraudulent intent and guilty knowledge; and the presentation at the bank under claim of ownership was sufficient evidence of a demand for payment. *State v. Riddell* 324
20. SAME—EVIDENCE OF ACTS OF OTHERS WHEN DEFENDANT WAS NOT PRESENT. In such a case, evidence of the occurrences whereby the owner was unlawfully deprived of the certificate of deposit is admissible to show title, although it was not claimed that the defendant was connected with the bunco performance itself; and the short time that had elapsed was a circumstance for the jury. *Id.* 324

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21. EMBEZZLEMENT—CONSPIRACY BETWEEN OFFICERS OF BANK—SUFFICIENCY OF PROOF. Where letters, books and declarations of the accused's associates are received under a promise to prove a conspiracy to embezzle the funds of a bank, there is sufficient prima facie evidence of the conspiracy to make the testimony admissible where it appears that none of the parties had any means, that the banks purchased by them were insolvent to the knowledge of all, that they used the deposits of one to pay the debts contracted for the purchase of the others, and solicited deposits representing that the banks were solvent, that the money was taken by defendant with the knowledge of his associates, and the funds were embezzled when the opportunity arose, and accused's associates were in communication with him while he was a fugitive from justice. *State v. Dix*..... 405
22. SAME—EVIDENCE OF INSOLVENCY OF THE BANK. In a prosecution against a bank president for the embezzlement of the funds of the bank, evidence of the receipt of deposits after the accused left the state, and of the closing of the bank without paying any of the depositors, is properly admitted as tending to show the insolvency of the bank at the time the money was taken, and the deceit practiced upon the depositors. *Id.* 405
23. DEFENSE OF INSANITY—SPECIAL VERDICT OF SANITY—EVIDENCE—COMPETENCY. In a prosecution for murder where the sanity of the accused is made an issue by him, and an inquest held at his request before a special jury, during which the main trial is suspended, a verdict of sanity by such special jury and the record in such proceeding is properly admitted as competent, although not conclusive, evidence as to his sanity. *State v. Champoux*.... 339
24. SAME—INSTRUCTIONS. In such case it is proper to refuse an instruction that such a verdict shall not have any bearing upon the sanity of the accused at the time of the commission of the offense. *Id.* 339

III. TRIAL—INSTRUCTIONS.

25. WITNESSES IN REBUTTAL—ENDORSEMENT OF NAMES ON INFORMATION. It is not error to allow witnesses to testify in rebuttal without endorsement of their names on the information. *Id.*.... 339
26. COURTS—JURISDICTION—REMOVAL OF CAUSES. A foreign subject accused of murder in the first degree committed within state jurisdiction is not entitled to a removal of the prosecution to the United States court. *Id.* 339
27. CRIMINAL LAW—PRESENCE OF DEFENDANT IN COURT—RECORD WHEN SUFFICIENT. The failure of the record to show that the

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- accused was present at the trial on a day named, cannot be urged as error, where the certificate discloses that the statement does not contain all the material facts, and the same is not certified to contain all the material facts that did occur, nor where a supplemental record shows that he was present on the day in question. *State v. Howard* 250
28. CRIMINAL LAW—TRIAL—REQUEST FOR WRITTEN INSTRUCTIONS. A request to instruct the jury in writing is complied with by reading from separate papers portions of instructions requested and marking the rejected portions with a lead pencil. *State v. Champoux* 339
29. SAME—INSTRUCTIONS—NECESSITY OF INQUEST—CORONER'S REASONS FOR NOT HOLDING. In a prosecution for murder, where the cross-examination of the coroner, who had declined to hold an inquest, was such as to leave the impression upon the minds of the jury that the inquest was necessary as a prerequisite to a prosecution, an instruction that no duty devolved upon him to hold an inquest when the cause of death was known to him, was not prejudicial as showing that the coroner was satisfied that the death was caused by the accused as charged. *State v. Howard*... 250
30. LARCENY—DEFENSE OF TAKING UNDER CLAIM OF RIGHT—WHEN TO BE SUBMITTED. A defense that property claimed to have been stolen was taken under a claim of right must be submitted to the jury unless the proofs are so convincing as to practically preclude any reasonable possibility of criminal intent. *State v. Eubank*.. 293
31. SAME—EVIDENCE—SUFFICIENCY. A motion for an acquittal should be overruled where there is any evidence tending to prove the crime charged. *Id.* 293
32. TRIAL—INSTRUCTIONS—COMMENT OF EVIDENCE. Where a letter had been admitted in evidence to show the intent of the defendant in taking possession of an animal which he was charged with stealing, it is not error or unlawful comment on the testimony, in refusing to reopen the case for the purpose of proving the handwriting, for the judge to state that "it is no issue in this case" and to direct the jury to disregard the matter suggested in the offer. *Id.* 293
33. SAME—COMMENT ON EVIDENCE. In a prosecution for larceny an instruction that "proof of the fact" of possession is sufficient to put upon defendant the burden of explaining such possession, is not objectionable as a comment on the evidence, especially when the succeeding portion adds, "if you find such fact from the evidence." *Id.* 293

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34. SAME—POSSESSION OF RANGE ANIMALS—PRESUMPTION—BURDEN OF PROOF. Bal. Code, § 7114, creates an exception to the general rule in ordinary larceny cases, and thereunder in the case of animals allowed to run on the range, proof of possession puts upon defendant the burden of explaining such possession. *Id.*..... 293
35. SAME—FALSE REPRESENTATIONS OF DEFENDANT—INSTRUCTIONS. An instruction as to false representations to the bank or "any one" is not erroneous when read in connection with others following it, where the central idea, repeatedly impressed upon the jury, made it clear that they were to consider only representations made to the bank. *State v. Riddell*..... 324
36. LARCENY—PROOF OF OWNERSHIP—CROSS-EXAMINATION—INSTRUCTIONS. Where the prosecuting witness states on direct examination that the stolen horse was his, what he says on cross-examination is matter for argument to the jury, and cannot be made the basis for an instruction assuming that he could not swear positively to his ownership of the property. *State v. Eubank*..... 293
37. SAME. An instruction as to "any statement made by the defendant" about the certificate after the making of certain false pretenses, is not objectionable as an assumption by the court that such a statement was made by the defendant. *State v. Riddell*.. 324
38. HOMICIDE—DEGREES OF OFFENSE—PERPETRATION OF RAPE—INSTRUCTIONS PROPER AS TO LESSER DEGREE ALTHOUGH EVIDENCE TENDED TO SHOW FIRST DEGREE ONLY. Under Bal. Code, § 7035, defining murder in the first degree as killing another with deliberate and premeditated malice, or in the perpetration of rape, etc., when an information charges the crime by strangling, it is not error to instruct as to lesser degrees and manslaughter in accordance with Bal. Code, § 6955, although the evidence tended strongly to show that the crime was committed while accused was perpetrating the crime of rape upon deceased (murder in first degree); since the crime defined by said § 7035, is a single one, however accomplished, and construed in connection with § 6955, authorizes a verdict for any degree inferior thereto. *State v. Howard*..... 250
39. HOMICIDE—MANSLAUGHTER EXCLUDED BY EXTRADITION ON CHARGE OF MURDER—INSTRUCTIONS DEFINING CRIME. Where the accused was extradited on the charge of murder, and so could be tried only for that offense, it is not error to refuse an instruction defining the crime of manslaughter and instructing that under the extradition laws he can not be tried therefor, and to acquit if guilty thereof, when the court properly defines murder in the first and second degrees, purposely, deliberation, premeditation, and malice, and instructs the jury to acquit if not guilty of either

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of the crimes defined, since the object of the requested instruction to obviate confusion between manslaughter and murder was fully met by the explicit instructions given. *State v. Lindgrind*. 440

40. HOMICIDE—FLIGHT—EFFECT OF—INSTRUCTIONS—ASSUMPTION OF FACT. In a prosecution for a homicide an instruction as to the effect of the flight of a person immediately after the commission of the offense, "if you find from the evidence that the defendant fled," etc., does not assume the fact that the defendant fled. *State v. Stents* 444
41. SAME—WEIGHT TO BE GIVEN TO FACT OF FLIGHT. Such an instruction properly leaves to the jury the weight to be given to the circumstance of flight. *Id.* 444
42. SAME—SUFFICIENCY OF EVIDENCE AS TO FLIGHT. There is sufficient evidence to warrant an instruction as to the circumstance of defendant's flight where, after running down and killing a bicyclist in a public road in the day time, defendant changed his course into an obscure road without stopping to render assistance, sought to avoid meeting any one, and separated from his companions, and avoided the town into which he was going and was making his way away from home at the time of his arrest. *Id.* 444
43. HOMICIDE—EVIDENCE OF GOOD CHARACTER—INSTRUCTIONS. Instructions that evidence of good character for peace and quietness is material to a defense where the accused is on trial for a homicide, are properly refused when they further clearly intimate that the jury might acquit on such evidence even though they find from the evidence that he was guilty; also when they are argumentative, and attempt to give the reasons for the law. *Id.* 444
44. SAME. It is sufficient to instruct that evidence of good character should be considered as tending to establish a defense, but that it could not avail if all the evidence satisfied the jury beyond a reasonable doubt as to his guilt. *Id.* 444
45. INVOLUNTARY HOMICIDE—ACCIDENTAL KILLING IN ATTEMPTING TO AVOID COLLISION—UNLAWFUL ACT OF RECKLESS DRIVING IN STREET—INSTRUCTIONS. In a prosecution for involuntary homicide where the evidence tended to show that defendant ran down and killed a bicyclist while wantonly and recklessly driving upon the public streets in such a manner as to endanger the lives of others, a requested instruction as to the effect of an accidental killing while attempting to avoid a collision is properly qualified by adding that it would be immaterial if the death resulted from such unlawful act of the defendant, since it would be no excuse that defendant tried to avoid the accident after it was too late. *Id.* 444

DAMAGES:

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- For breach of contract, payment as an estoppel. See **PLEADING**, 9.
- For conversion, when not excessive. See **CONVERSION**, 2.
- For conversion of goods purchased on instalment plan. See **CONVERSION**, 3.
- For inferior brick substituted. See **CONTRACTS**, 2.
- For injury to mill, through defect in log sold. See **SALES**, 3.
- For physician's charges, failure to prove amount. See **TRIAL**, 7.

1. **DAMAGES—PERSONAL INJURIES—VERDICT—WHEN EXCESSIVE.** A verdict for \$9,000 for personal injuries through stepping into a hole in the sidewalk, sustained by a woman fifty-five years of age, engaged in nursing and general housework, held excessive and reduced to the sum of \$6,000. *Stone v. Seattle*..... 644

DEATH BY WRONGFUL ACT:

- Brakeman making coupling. See **MASTER AND SERVANT**, 2.
- Involuntary homicide while driving. See **CRIMINAL LAW**, 45.
- Lack of guard rail. See **BRIDGES**, 1.
- Pedestrian in street. See **NEGLIGENCE**, 1.

1. **DEATH BY WRONGFUL ACT—RIGHT OF ACTION—SUIT BY EXECUTOR FOR BENEFIT OF WIDOW.** Under Bal. Code, §§ 4828 and 4838, an action for damages for wrongful death may be maintained by the decedent's executor, for the use of his widow, in the absence of an action by her, and is not subject to an objection of want of capacity in the plaintiff to sue, although the widow's sanction must be shown before the defense is put in. *Copeland v. Seattle*. 415

DEDICATION:

- By prescriptive use. See **ADVERSE POSSESSION**, 3, 4.
- Regulation of platting additions. See **MUNICIPAL CORPORATIONS**, 5-8.

1. **DEDICATION—INTENTION—PLATS—STREETS NOT DESIGNATED—PRESUMPTION.** An intention to dedicate a street below the line of high tide at the west side of a plat will not be presumed from the fact that the streets at right angles thereto are not closed at this point, and are closed on another part of the plat, when a blank space is left and no street is designated there by name, or the boundaries marked, while the other streets are designated both by name and boundaries, and on the east side a street is so designated; especially in view of the law of Oregon territory in force at the time requiring the width and boundaries of streets to be

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designated on the plat, and since an intent to dedicate is not presumed and must clearly appear. *Columbia & Puget Sound R. Co. v. Seattle* 513

DEED:

- By heirs pending administration. See DESCENT AND DISTRIBUTION, 1.
- Construction of, sufficiency as color of title. See ADVERSE POSSESSION, 1.
- Of lands sold for taxes. See TAXATION, 1.
- Of mortgagee, when not an assignment of the mortgage. See MORTGAGES, 1.
- When considered as a mortgage to secure advances; foreclosure. See MORTGAGES, 4, 5.
- When not a mortgage; option to repurchase. See VENDOR AND PURCHASER, 1.
- When not void, for undue influence. See FRAUD, 1.
- Of state to United States; validity; existing leases. See PUBLIC LANDS, 6-11.

DEMAND:

- Before suit, when unnecessary in action for goods sold. See ACTIONS, 1.
- Before suit against city. See MUNICIPAL CORPORATIONS, 3.

DEMURRER:

See PLEADINGS.

DEPOSIT IN COURT:

- Paying costs out of. See COSTS, 1.

DEPOSITIONS:

- How brought up on appeal. See APPEAL AND ERROR, 28.
- Impeaching without laying foundation. See WITNESSES, 7.

DEPOTS:

- Private way to. See ADVERSE POSSESSION, 3.

DEPUTY:

- Prosecutor, authority to sign information. See CRIMINAL LAW, 1.

DESCENT AND DISTRIBUTION:

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1. **DESCENT—DISTRIBUTION—DEEDS BY HEIRS—PENDING ADMINISTRATION—TITLE VESTS WHEN—DEMURRER.** A title founded upon deeds of the heirs prior to the law of 1895, made pending administration of the estate, is sufficient, as against general demurrer, in view of Bal. Code, § 6361, recognizing conveyances by heirs prior to distribution, and Laws 1895, providing that the title to real estate shall vest in the heirs immediately upon the death of the ancestor, and expressly extending the rule to the transmission of all such previous titles, which were thereby confirmed. *Demaris v. Barker* 200

DISMISSAL:

- Of action. See **ACTIONS**, 2.
- Of appeal. See **APPEAL AND ERROR**, 16, 17, 31.

DISTRIBUTION:

See **DESCENT AND DISTRIBUTION**.

DIVORCE:

- When not set aside for want of attorney's authority to appear. See **JUDGMENTS**, 4.
- Division of property by parties. See **COMMUNITY PROPERTY**, 1.

DUPLICITY:

- In information. See **CRIMINAL LAW**, 6-8.

EJECTMENT:

- Defense of adverse possession. See **ADVERSE POSSESSION**, 2.
- Receiver to collect rents, when not appointed in. See **RECEIVERS**, 1-3.

1. **EJECTMENT—TITLE OF PLAINTIFF—WEAKNESS OF DEFENDANT'S TITLE.** In an action to recover the possession of real property, the plaintiff cannot recover upon the weakness of defendant's title, and if without title himself the action fails. *Humphries v. Sorenson* 563

2. **EJECTMENT—AFFIRMATIVE DEFENSE—SUFFICIENCY OF EVIDENCE.** In an action of ejectment where defendants set up as an affirmative defense that they were in possession under a contract to purchase from the plaintiff, the plaintiff makes out a *prima facie* case by showing that the defendants were originally in possession under a contract to purchase from a third party, borrowed money to make improvements, and were in default, and assigned their

EJECTMENT—CONTINUED.

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contract to the plaintiff, who purchased the property from the third party to protect the advances made, and that defendants failed to consummate an agreement to repurchase the property from plaintiff; and defendants failing to establish their affirmative defense by a preponderance of the testimony, findings for the plaintiff will be sustained. *Russell v. Gay*..... 33

3. EJECTMENT—DEFENSES—PLEADING—MORTGAGE IN POSSESSION. In an action to recover possession of real estate, an answer showing that the defendant is a mortgagee in possession with the consent of the owners of the legal title and under a written assignment of the rents for the purposes of security until arrears are paid, and that the same are not paid, and that plaintiff is a subsequent purchaser with notice, shows a rightful possession and is not demurrable. *Peterson v. Philadelphia Mtg. etc. Co.*..... 464
4. SAME—TRIAL BY JURY—EQUITABLE DEFENSES TO LEGAL ACTION. Such an answer raises equitable defenses to be first tried by the court, and plaintiff is not entitled to a jury trial. *Id.*..... 464
5. EJECTMENT—DEFENSES—MORTGAGEE IN POSSESSION—BONA FIDE PURCHASER—LIMITATION OF ACTIONS. In an action by a vendee of the mortgagors to recover possession of premises from a mortgagee in possession, it is not error to refuse leave to file an amended complaint setting up the statute of limitations to the defense of the mortgage and possession thereunder, since the open possession of the mortgagee was sufficient to put the plaintiff upon inquiry as to the rights claimed and he can not claim to be a bona fide purchaser without notice. *Id.*..... 464

ELECTIONS:

- For charter amendments. See MUNICIPAL CORPORATIONS, 1, 2.
- For consolidated city. See STATUTES, 1-3.

EMBEZZLEMENT:

See CRIMINAL LAW, 6-8.

EMINENT DOMAIN:

- By foreign corporations. See ALIENS, 1-3.
 - Pending proceedings no defense to forcible entry. See FORCIBLE ENTRY AND DETAINER, 4.
 - Power of mining company. See CORPORATIONS, 2.
 - Right to, when obviates necessity of appraisalment of improvements on tide lands. See PUBLIC LANDS, 4.
1. EMINENT DOMAIN—PUBLIC USE—RIGHT OF WAY FOR LOGGING ROADS—TAKING PROPERTY FOR PRIVATE USE. Laws of 1899, p. 255.

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- granting to the owner of timbered lands the right to condemn a right of way for logging roads and lumbering purposes contravenes Const., art. 1, § 16, prohibiting the taking of private property for private use. *Healy Lumber Co. v. Morris*..... 490
2. SAME—PUBLIC USE A JUDICIAL QUESTION—DISCRETION. Const., art. 1, § 16, providing that the question in condemnation proceedings whether a use is a public use shall be a judicial question, negatives the idea that any weight should be given by the courts to the fact that the legislature has pronounced a certain thing a public use, and submits the question of public use to the discretion of the courts. *Id.*..... 490
3. SAME—STATUTES—PRESUMPTION. Nor does the ordinary presumption in favor of the constitutionality of an act apply to a legislative assertion upon a subject that has been specially submitted to the courts. *Id.*..... 490
4. SAME—DISTINCTION BETWEEN LOGGING AND BOOM COMPANIES. A private logging company in the exclusive prosecution of its own private business stands upon a footing in relation to the power of eminent domain different from that occupied by a boom company doing a carrying business for the public. *Id.*..... 490
5. SAME—PUBLIC BENEFIT NOT PUBLIC USE. The public use authorizing the exercise of the right of eminent domain contemplated by the constitution is not synonymous with public benefit, and a use for private enterprises does not authorize the exercise of the right however much public policy demands it, or whatever the public benefit therefrom may be, but it must be a use by the public or by some agency that is quasi public. *Id.*..... 490
6. SAME—CONDEMNATION OF PRIVATE WAYS OF NECESSITY—GRANT. A condemnation proceeding by the owner of timbered lands for the purpose of acquiring a right of way for a logging road and lumbering purposes, under Laws of 1899, p. 255, cannot be sustained under the provision of the constitution, art. 1, § 16, permitting the taking of private property for private ways of necessity, as such ways have reference to the common law definition of the term, requiring the element of grant, and having no reference to the land of strangers. *Id.*..... 490

EQUITY:

- Equitable defense in ejectment. See EJECTMENT, 4.

ESTOPPEL:

- To assert estimates were not furnished. See SALES, 10.
 — To claim damages, by full payment. See PLEADINGS, 9.

ESTOPPEL—CONTINUED.

- To prove marriage, by later ceremony. See **MARRIAGE**, 1.
- To rescind sale, by partial acceptance of goods. See **SALES**, 6.
- Recital in notice of pendency of suit. See **INDEMNITY**, 7.
- To set up statute of frauds, by accepting benefits. See **EXECUTORS AND ADMINISTRATORS**, 4; **COMPROMISE**, 1.

EVIDENCE:

- Abrogation of contract, burden of proof. See **CONTRACTS**, 2.
- Acts when defendant was not present. See **CRIMINAL LAW**, 20.
- Admission of receipt of goods. See **SALES**, 11.
- Adverse possession, sufficiency. See **ADVERSE POSSESSION**, 2.
- Amount paid physicians, instructions. See **TRIAL**, 7.
- Appointment of receiver, sufficiency. See **RECEIVERS**, 1.
- Conspiracy, sufficiency. See **CRIMINAL LAW**, 21, 22.
- Contract by telephone, sufficiency. See **CONTRACTS**, 3.
- Conversion, sufficiency. See **CONVERSION**, 2.
- Custom of merchants, competency. See **SALES**, 7.
- Defect in sidewalk. See **MUNICIPAL CORPORATIONS**, 17, 20-23.
- Ejectment, sufficiency. See **EJECTMENT**, 2.
- False pretenses, sufficiency. See **CRIMINAL LAW**, 19.
- Flight as circumstance of guilt. See **CRIMINAL LAW**, 41, 42.
- Fraud in securing membership. See **BENEFICIAL ASSOCIATIONS**, 1, 2, 7.
- Good character. See **CRIMINAL LAW**, 43, 44.
- Harmless error in admission. See **APPEAL AND ERROR**, 39-41, 43.
- Impeaching, by stenographer. See **WITNESSES**, 5.
- Impeaching without laying foundation. See **WITNESSES**, 6-7.
- Journals of legislature, to explain act, competency. See **STATUTES**, 2, 3.
- Judicial notice of location of city. See **CRIMINAL LAW**, 13.
- Life estate under absolute deed, finding not sustained. See **FRAUD**, 2.
- Marriage, sufficiency. See **MARRIAGE**, 1.
- Miscarriage, in prosecution for rape, competency. See **CRIMINAL LAW**, 14, 15.
- Negligence, as to sidewalks, competency. See **MUNICIPAL CORPORATIONS**, 21-23. Of master. See **MASTER AND SERVANT**, 3. As to prior defects and repairs. See **MASTER AND SERVANT**, 6. As to contributory negligence of servant. See **MASTER AND SERVANT**, 7, 8. And of pedestrian. See **MUNICIPAL CORPORATIONS**, 19.

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- Objections to, necessity. See APPEAL AND ERROR, 2, 3.
- Other offenses, in incest and rape. See CRIMINAL LAW, 10-12.
- Possession of stolen property. See CRIMINAL LAW, 16-18, 34.
- Price bid on award of city printing, when immaterial. See NEWSPAPERS, 5.
- Right to premises, when immaterial. See FORCIBLE ENTRY AND DETAINER, 2.
- Sanity, competency of special verdict. See CRIMINAL LAW, 23.
- 1. EVIDENCE—LOST WRITING. Secondary evidence of the contents of written instruments is admissible when the instruments are lost. *State v. Champoux*..... 339
- 2. EVIDENCE—HEARSAY. The exclusion of immaterial and hearsay evidence is not error.—*Id.*..... 339
- 3. DAMAGES—EXPERT TESTIMONY—MEDICAL WORKS—CORRECTNESS OF STATEMENT NOT PERTAINING TO MEDICAL SCIENCE—REFLECTION ON HONESTY. In an action for personal injuries it is proper to exclude the testimony of a physician that a medical work correctly states that patients with traumatic neurosis, injured in railroad accidents, usually recover after the settlement of pending litigation, as it does not pertain to medical science, and is merely a reflection upon individual honesty. *Stone v. Seattle*.... 644

EXCEPTIONS:

See APPEAL AND ERROR.

- To judgment, not waived by assent to form. See JUDGMENTS, 1.

EXECUTION:

- On prematurely revived judgment. See JUDGMENTS, 6.
- Wrongful sale without appraisalment of exemptions. See CONVERSION, 1-3.
- 1. EXECUTION—NOTICE OF SALE—SALE OF LEASEHOLD. Bal. Code, § 5274, regulating execution sales of real estate "or any interest therein," governs the sale of the interest of a lessee of state lands, and such a sale made upon the notice provided for sales of personal property is void. *Reilley v. Anderson*..... 58
- 2. EXECUTIONS—TRANSCRIPT OF JUDGMENT FROM ANOTHER COUNTY—HOW ISSUED—SALE. An execution cannot be issued by the superior court of one county upon a transcript of a judgment entered in another county, although Bal. Code, § 5132, creates a lien therefor upon the debtor's real estate in the county where filed; and a sale on such an execution is void. *Humphries v. Sorenson*..... 563

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- Action by, for death, for use of widow. See **DEATH BY WRONGFUL ACT**, 1.
- Sale to pay debts, order upon when final. See **JUDGMENTS**, 10.
- Sale by, of homesteader's improvements. See **PUBLIC LANDS**, 1, 2.
- 1. **ADMINISTRATORS—CONTRACT TO ACT NOMINALLY—VALIDITY—WAIVER OF FEES.** Where a surviving husband acquires all the interests of other heirs in the community realty, and there are no debts, he may employ a person to act as administrator in a formal manner for the purpose of clearing the title, under an agreement waiving the statutory fees allowed administrators, and without surrendering possession or giving up the management of the estate. *In re Field's Estate*..... 63
- 2. **SAME—STATUTE OF FRAUDS—PERFORMANCE WITHIN ONE YEAR.** Such an agreement, not in writing, is not void as against the statute of frauds because not to be performed within one year, since it was but a waiver of rights, calling for no specific thing to be done. *Id.*..... 63
- 3. **SAME.** Moreover the necessity of such duration, not the expected duration, is the test, and does not bring such contract within the statute. *Id.*..... 63
- 4. **SAME—PART PERFORMANCE—ESTOPPEL.** After part performance of such contract, by accepting the office, the administrator will be estopped from alleging its invalidity. *Id.*..... 63
- 5. **ADMINISTRATION—PRIORITY—WHO ENTITLED TO—DISQUALIFICATION OF HUSBAND.** Under Bal. Code, § 6141, conferring the prior right to administration upon the surviving husband, or upon such person as he may request to be appointed, the husband, although convicted of a felony and himself disqualified to act, may designate the person entitled to the appointment. *McLean v. Roller*.. 166
- 6. **SAME—WAIVER OF RIGHT—TIME FOR ASSERTING PREFERENCE.** The neglect of the person entitled to letters of administration to petition therefor for more than forty days after the death of the intestate waives the right to priority, under Bal. Code, § 6141, and confers upon the court discretionary power to appoint any suitable person, and where two suitable persons subsequently apply, a selection made without reference to former priorities will not be disturbed on appeal. *Id.*..... 166
- 7. **SAME—JURISDICTION—SUFFICIENCY OF APPLICATION—AFFIDAVIT AS TO HEIRS—FAILURE TO FILE.** The failure of the applicant for letters of administration to file with his petition an affidavit, stating the names and residences of the heirs, is not a jurisdictional defect, since the same section requires the jurisdictional facts to

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be stated in the petition, and where this is done and the affidavit is filed at the time of the hearing the appointment is authorized.

Id. 166

8. **EXECUTORS—SALES—ACTION TO ENJOIN SALE TO PAY DEBTS—COMPLAINT—SUFFICIENCY—ADMISSIONS.** An admission that the land of an estate was sought to be sold for the purpose of paying the debts of the estate, does not render a complaint to enjoin the sale demurrable, when it alleges facts showing that the land in question was only secondarily liable, if at all, and that the sale thereof would be inequitable. *Demaris v. Barker*..... 200
9. **SAME—EFFECT OF ORDER OF SALE—FRAUD.** A complaint to enjoin the sale of lands to pay the debts of the estate is not demurrable because it appears to be pursuant to an order of the probate court, where it alleges that the order was procured through conspiracy and fraud, and without notice to plaintiff until after the sale was advertised. *Id.*..... 200
10. **ADMINISTRATOR'S SALE—RIGHTS OF PURCHASER.** The rule of *caveat emptor* applies to administrator's sales. *Towner v. Rodged.* 153

EXEMPTIONS:

- Of homesteader's improvements. See PUBLIC LANDS, 1, 2.
- Wrongful seizure of, damages recoverable. See CONVERSION, 1-3.

EXHIBITS:

- Taking to jury room. See TRIAL, 5.

EXPERTS:

- Testimony of, not relating to medical science. See EVIDENCE, 3.

EXPLOSIVES:

1. **NEGLECT—SALE OF EXPLOSIVE—PLEADING—SUFFICIENCY OF COMPLAINT—DEFINITENESS.** A complaint alleging negligence in the manufacture and bottling of a dangerous explosive called champagne cider by failing to observe the proper temperature, amount of gas, and strength of the bottles, and failing to attach labels or give notice of the danger, is not demurrable as being so indefinite as to be meaningless, but the remedy is by motion to make more definite and certain. *Weiser v. Holzman*..... 87

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2. **SAME—LIABILITY TO STRANGERS—CONNECTION BETWEEN NEGLIGENCE AND INJURY.** One who knowingly delivers a dangerous explosive without giving notice to the purchaser of its intrinsic danger, is liable to any person who is, without fault, injured thereby, without reference to any privity of contract, and a complaint by a stranger is not demurrable on the ground that no causal connection between the negligence and the injury is shown. *Id.* 87

EXTRADITION:

- On charge of murder, instructions as to manslaughter. See **CRIMINAL LAW**, 39.

FALSE IMPRISONMENT:

- Under void ordinance, liability of city. See **MUNICIPAL CORPORATIONS**, 10-12.

FALSE PRETENSES:

- See **CRIMINAL LAW**, 4, 5, 19, 20, 35, 37.

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- Judgment in, when not a bar. See **APPEAL AND ERROR**, 1.
 — Jurisdiction over foreign subjects. See **CRIMINAL LAW**, 26.
 — Jurisdiction over Indians. See **INDIANS**, 1, 2.

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- For jury trial. See **JURY**, 1, 2.

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- See **MASTER AND SERVANT**, 11.

FELONY:

- Former conviction. See **WITNESSES**, 4.

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- As circumstance of guilt. See **CRIMINAL LAW**, 41, 42.

FORCIBLE ENTRY AND DETAINER:

1. **FORCIBLE ENTRY AND DETAINER—COMPLAINT—SUFFICIENCY.** Under Bal. Code, § 5526, a complaint in forcible entry and detainer is sufficient when it states that, while plaintiff was in actual possession of the premises, the defendants broke open the enclosures

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- during plaintiff's absence, and by force and violence continue to occupy and refuse to surrender the same. *Gore v. Altice*..... 335
2. **SAME—TITLE AND RIGHT OF PLAINTIFF—CLAIM OF RIGHT BY DEFENDANT.** In an action of forcible entry and detainer, neither the title or rightfulness of plaintiff's possession, nor the good faith and claim of right of the defendants, are in issue, and evidence thereof is properly excluded. *Id.*..... 335
3. **FORCIBLE ENTRY AND DETAINER—SUMMONS—WHEN RETURNABLE.** Bal. Code, § 5532, provided that a summons in forcible entry shall be returnable at a date designated therein, which shall not be less than six nor more than twelve days from its date, the date referred to applies to the date of the service of the summons, and not to the date of its issuance endorsed thereon; hence a summons issued February 2, returnable February 18, and served February 9, is sufficient. *Morris v. Healy Lumber Co.*..... 451
4. **FORCIBLE ENTRY AND DETAINER—HOLDING OVER AFTER EXPIRATION OF TERM—EMINENT DOMAIN—PENDENCY OF CONDEMNATION PROCEEDINGS AS A DEFENSE.** In an action for unlawful detainer, a defendant corporation holding over after expiration of a lease can not justify its possession, or ask a suspension of the judgment, by setting up the institution of proceedings for the appropriation of the land which are still pending, and by the offer to give security until the same is determined. *Id.*..... 451
5. **SAME—NOTICE TO QUIT.** In forcible entry and detainer, where the answer does not deny that a lease for a definite term had expired, notice to quit is not required under Bal. Code, § 5527. *Id.*..... 451
6. **SAME—DUE PROCESS OF LAW.** The forcible entry and detainer act does not violate the fourteenth amendment to the constitution of the United States, prohibiting the states from depriving a person of property without due process of law. *Id.*..... 451

FORECLOSURE:

- Of chattel mortgage. See **CHATTEL MORTGAGES**, 1-3.
- Of mortgages. See **MORTGAGES**, 2-3.
- Of liens. See **MECHANIC'S LIENS**, 3.
- Of tax liens, summons in. See **PROCESS**, 1; **JUDGMENTS**, 9.

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- Subject to trial in state court. See **CRIMINAL LAW**, 26.

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- Of insurance. See **INSURANCE**, 1.

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- Application for, not admission against title. See **ADVERSE POSSESSION**, 4.

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- False pretenses. See **CRIMINAL LAW**, 19, 20.
- Ground for expulsion from society. See **BENEFICIAL ASSOCIATIONS**, 1, 2, 5.
- In securing divorce. See **JUDGMENTS**, 4.
- In infringement of trade-mark, necessity. See **TRADE-MARKS**, 2.
- Probate order to sell land, may be attacked for. See **EXECUTORS AND ADMINISTRATORS**, 9.
- Rescission for, necessity of tender. See **CANCELLATION OF INSTRUMENTS**, 1.

1. **DEED—FRAUD—UNDUE INFLUENCE—LIFE ESTATE—PLEADINGS—VARIANCE—FINDINGS OUTSIDE THE ISSUES.** In an action to set aside a deed absolute on its face upon the ground of undue influence and coercion, in which the answer and the reply raise the further question whether the deed was intended as a mortgage to secure repayment of advances, a finding of fact that the deed was given under an agreement that the grantor should retain a life estate in the premises is not warranted by the issues presented or tried, and the variance is not such as is obviated by an amendment deemed to have been made. *Butler v. Carvin*..... 621
2. **SAME—INCONSISTENT FINDINGS.** In such an action, the finding that the grantor retained a life estate is inconsistent with a finding that the deed conveying a fee simple was voluntarily executed without any threats or coercion and with full knowledge of its purport, and is not warranted by evidence tending to show that the deed was given on account of large advances made, and that the parties contemplated living together on the property. *Id.* 621

FRAUDS, STATUTE OF:

- Estoppel by receipt of benefits. See **COMPROMISE**, 1; **EXECUTORS AND ADMINISTRATORS**, 4.
1. **PERFORMANCE WITHIN ONE YEAR—DURATION.** An agreement by a surviving husband, who has acquired all the interests of other heirs, to employ a person to act as administrator in a formal manner for the purpose of clearing the title, and waiving the statutory fees allowed administrators, is not void as against the statute of frauds because not to be performed within one year, since it is but a waiver of rights, calling for no specific thing to be done; and moreover, the necessity of such duration,

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not the expected duration, is the test, and does not bring such contract within the statute. *In re Field's Estate*..... 63

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— Right of judge to hold office. See JUDGES, 2.

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- Logging road. See EMINENT DOMAIN, 1-5.
- Negligence as to. See MUNICIPAL CORPORATIONS, 16-23.
- Private way of necessity. See EMINENT DOMAIN, 6.
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— Exception of, daily paper. See NEWSPAPERS, 3.

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— Right to enter, and exemptions. See PUBLIC LANDS, 1, 2.

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- Actions for division of property. See COMMUNITY PROPERTY, 1.
- Action for death of husband. See DEATH BY WRONGFUL ACT, 1.
- Administration, survivor disqualified by conviction, preference rights. See EXECUTORS AND ADMINISTRATORS, 5.
- Marriage, presumption from cohabitation. See MARRIAGE, 1.
- Contracts by one spouse. See COMMUNITY PROPERTY, 2, 3.

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- Of homesteader, exempt. See PUBLIC LANDS, 1, 2.
- On tide lands, what are. See PUBLIC LANDS, 3, 4.

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- Agents authority, acting for both parties. See PRINCIPAL AND AGENT, 1, 3-5.
 - Limitation of suit. See LIMITATION OF ACTIONS, 1.
 - Necessary parties to action. See PARTIES, 1.
 - Release by alterations in work. See PRINCIPAL AND SURETY.
1. CONTRACTOR'S BOND—ACTION ON—SUFFICIENCY OF COMPLAINT. A complaint on the bond of a subcontractor is sufficient where it sets out the contract and bond requiring him to pay all claims and alleges that he incurred indebtedness in prosecuting the work which the plaintiff was required to pay, and that reimbursement was refused upon demand. *Pacific Bridge Co. v. U. S. Fidelity etc. Co.*..... 47
 2. SUBCONTRACTOR'S BOND—EVIDENCE—CITY AS OBLIGEE. In an action brought by a contractor upon the bond of a subcontractor upon city work, to recover the amount paid out for labor and supplies in completing defendant's contract, the plaintiff's bond to the city, given under a statute requiring a contractor to give bond to pay all such labor and supply claims, is admissible in evidence, although running to the city instead of to the state, as required by law, as it is a good common law bond requiring plaintiff to make the payment. *Id.*..... 47
 3. INDEMNITY BONDS—CONSTRUCTION. A surety company's bond for the faithful performance of the work of a subcontractor is in the nature of an insurance policy, not to be construed *strictissimi juris*, and general clauses appended to the principal contract authorizing changes should be considered part of the subcontract and admissible against the surety. *Id.*..... 47
 4. JUDGMENT—BOND TO SAVE HARMLESS FROM—DUE NOTICE OF SUIT. A notice to defend a suit given eleven days before the trial of an action against a city for personal injuries, is prima facie "due notice," making the judgment rendered against the city binding upon a contractor, under his bond to save the city harmless therefrom and agreeing to be bound thereby upon "due notice" thereof. *Spokane v. Costello.*..... 98
 5. SAME. Such notice is not conclusive, and it is a good defense to an action on the bond that the notice did not give sufficient time to prepare for trial, that the city did not defend in good faith, and that a meritorious defense to the action existed. *Id.*.. 98
 6. SAME—ACTION TO RECOVER AMOUNT OF JUDGMENT—PROOF OF CONTRACTOR'S NEGLIGENCE—NONSUIT. In an action on a contractor's bond, conditioned to save the city harmless from all actions and claims for damages arising from the negligence of the contractor and agreeing to be bound by any judgment upon due

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notice of the suit, the city cannot recover the amount paid out on a judgment for damages, without showing that the negligence complained of in the damage case was the act of the contractor, and no such proof being offered, and the pleadings and record in the damage case failing to connect the contractor therewith, a nonsuit should be granted. *Id.*..... 98

7. SAME—ESTOPPEL. In such a case, a mere recital in the notice of the pendency of the damage suit is not proof that the negligence was the act of the contractor, nor would such recital operate as an estoppel against him. *Id.*..... 98

8. SAME—CONSIDERATION—PREPAYMENT OF PREMIUM. An indemnity bond guaranteeing the repayment of money advanced is valid without the payment of any premium, when it contains no condition making such payment a prerequisite, and the advance was secured by representations of the company's general agents showing an interest of the company in the advance, which was to save a loss on other bonds issued by the company. *Pacific Nat. Bank v. Aetna Indemnity Co.*..... 428

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1. HOMICIDE—INDIANS—OFFENSE COMMITTED ON RESERVATION—JURISDICTION OF STATE COURT—TRIBAL RELATIONS—WHEN NOT SHOWN—SEVERING RELATIONS—PROOF OF WHEN NOT NECESSARY. Where an Indian accused of murder committed upon a reservation testified that he was not a member of the tribe and had never had any tribal relations therewith, and was never allied by association with his ancestral tribes, and that he lived and worked among white people, no tribal relations are shown, and he cannot claim that the federal courts have exclusive jurisdiction of the offense on account of the failure of the prosecution to prove that he had severed his tribal relations. *State v. Howard*..... 250
2. SAME—JURISDICTION OF FEDERAL COURTS LIMITED TO INDIANS SUSTAINING TRIBAL RELATIONS. A state court has jurisdiction of an offense committed within the limits of a reservation against an Indian, by another who had never sustained any tribal relations, since Act. Cong. 1885, c. 341, § 9, 23 Stat. 385, providing that a crime by an Indian against another within the limits of a reservation shall be tried by the federal courts, must be limited to Indians sustaining tribal relations, when construed in connection with all the other sections of the act, which all relate only to such Indians. *Id.*..... 250

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1. **INFANCY—INVESTMENT IN OUTLAWED MORTGAGE—DISAFFIRMANCE—STATUTE OF LIMITATIONS—EFFECT OF MINORITY—RIGHTS OF SUBSEQUENT LIENORS.** A minor who was induced by misrepresentations of the mortgagor to purchase the mortgaged premises, and, in order to acquire title, to invest in an outlawed mortgage, can not afterwards claim that the mortgage was revived as against subsequent lien holders whose rights had attached, or secure any priority over them on account of his minority. *De Voe v. Rundle*..... 604

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- To restrain flow of surface water. See **WATERS**, 2.
 - Enforcement of ordinance. See **MUNICIPAL CORPORATIONS**, 8, 9
 - Infringement of trade-mark. See **TRADE-MARKS**, 1-3.
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1. **INJUNCTION—RESTRAINING ENFORCEMENT OF PENAL ORDINANCE.** Injunction against the enforcement of a penal ordinance not a police regulation, which affects valuable property rights, may be maintained where otherwise resort to the criminal courts would be required to test the validity of the law. *Hillman v. Seattle*.. 11

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— Necessity of. See **CRIMINAL LAW**, 29.

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- Notice to insane member of expulsion from society. See **BENEFICIAL ASSOCIATIONS**, 4-7.
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- Prepayment of premiums. See INDEMNITY, 8.
- Validity of benefit certificate. See BENEFICIAL ASSOCIATIONS, 1-7.

1. LIFE INSURANCE—STALE DEMAND—FAILURE TO PAY PREMIUMS—NOTICE OF FORFEITURE—LAPSE OF POLICY IN MUTUAL COMPANY. Where the insured pays the first semi-annual premium upon a life policy in a mutual company, and for twelve years neither pays or offers to pay any premium, an action by his administrator, based on the theory that the statutory notice of forfeiture was not given, will be dismissed for the reason that the demand is a stale one, irrespective of statutory regulations as to forfeitures, as the statute will be considered waived and the policy rescinded by the insured. *Lone v. Mutual Life Ins. Co.*..... 577

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- Prospective operation of contract for payment of. See CONTRACTS, 4.
1. INTEREST—PAYABLE ANNUALLY—NOT COMPOUND. A note providing for the payment of interest annually does not entitle the holder to compound interest or make the accumulated interest a separate debt. *Cullen v. Whitham*..... 366

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- Visiting judge, power. See COURTS, 2.
1. POLICE JUDGE—TEMPORARY APPOINTMENT—AUTHORITY OF DE FACTO OFFICER. Under Laws 1899, p. 137, § 11, authorizing the mayor to appoint a police judge *pro tem.* in the absence or disability of the regular judge, such appointee is a *de facto* judge, and his judgments are not subject to collateral attack by reason of the fact that the regular judge was not absent or disqualified and there was in fact no vacancy. *Smith v. Sullivan* 30
 2. HABEAS CORPUS—QUESTIONING JUDGE'S TITLE TO OFFICE. On habeas corpus, the right of the judge ordering the commitment of the prisoner to hold his office can not be inquired into, as that question is wholly distinct from the question of the jurisdiction of the court over the offense or the parties. *Id.*..... 30

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- Appeal from, suspended by motion to vacate. See **APPEAL AND ERROR**, 12.
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 - Transcript from another county, execution on. See **EXECUTION**, 2.
 - Vacation of, how reviewed. See **APPEAL AND ERROR**, 25.
1. **JUDGMENT—ENTRY—FINDINGS OF FACT—CONSENT TO FORM—EXCEPTIONS.** The endorsement upon the findings and judgment entry of "O. K." signed by the attorney for the defeated party will be considered as an assent only to the form, where such intent is shown by the taking of exceptions at the time the decision was rendered and after the entry of the judgment. *Humphries v. Sorenson*..... 563
 2. **JUDGMENT—PREMATURELY ENTERED WITHOUT HEARING.** A judgment entered on the court's own motion after issue joined, without any hearing, trial, or opportunity for hearing, is premature and irregular, and will be reversed on appeal. (*State ex rel. Hennessy v. Huston, supra*, followed.) *Hennessy v. Tacoma Smelting & Refining Co.*..... 423
 3. **JUDGMENT—VALIDITY—UNAUTHORIZED APPEARANCE OF ATTORNEY—NATURE OF PROOF.** A judgment entered upon the appearance of an attorney without service of process will be set aside on account of the attorney's want of authority only upon clear and convincing proof that the appearance was unauthorized. *Turner v. Turner*..... 118
 4. **JUDGMENT—ACTION TO SET ASIDE—AUTHORITY OF ATTORNEY TO APPEAR—EVIDENCE—SUFFICIENCY.** A judgment of divorce entered upon the appearance of an attorney for the wife should not be set aside upon the testimony of the wife that the appearance was not authorized, where the attorney was her general counsel, and it appears from his letters that he sent her a copy of the summons and complaint shortly after service with the answer thereto, notified her of the decree immediately, advised her of its effect,

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and she recognized the divorce and expressed gratification thereat, and where the husband and his attorney testify that before suit she instructed service to be made upon such attorney. *Id.* 118

5. JUDGMENT—RES JUDICATA—APPEAL PENDING. A judgment of the federal court dismissing an action is not res judicata of like matters involved in a prior suit in the state court, when it appears that the federal cause has been appealed to the United States circuit court of appeals, and that no mandate has been received or filed in the clerk's office. *Hennessy v. Tacoma Smelting & Refining Co.* 423
6. JUDGMENT—REVIVAL—PREMATURE ORDER—QUASHING EXECUTION. Under 2 Hill's Code, § 462, providing that a judgment may be revived upon motion at the end of five years, an order of revival before the five years have elapsed is void and execution issued thereon should be quashed. *Tacoma Nat. Bank v. Sprague.* 285
7. SAME—LIEN—DURATION—STATUTES—REPEAL. Laws 1877, p. 66, § 326, providing that parties may continue the lien of a judgment before the expiration of the five-year period, was repealed by the code of 1881, which left out such provision in re-enacting the law relating to the revival of judgments, since by § 3319 all prior laws relating to the same subject were expressly repealed. *Id.* 285
8. SAME—PREMATURE REVIVAL—ACTION ON JUDGMENT. A premature proceeding to revive a judgment by motion cannot be sustained upon the ground that one may have a judgment upon a judgment before the expiration of five years, since that must be done by an independent suit. *Id.* 285
9. JUDGMENT—VACATION OF DEFAULT—GOOD CAUSE TO BE SHOWN. Under Bal. Code, § 4880, a nonresident defendant, served by publication in a tax lien foreclosure, is not entitled to the vacation of a default judgment within one year as a matter of right, but good cause must be shown. *Whitney v. Knowlton.* 319
10. JUDGMENTS—ORDER CONSTRUING WILL—VACATION—APPEAL—APPEALABLE ORDERS. Where, upon application for the sale of certain real estate to pay debts of the estate, the parties appear and contest the matter, and the court finds that under the terms of the will certain other real estate is specifically charged with the payment of the debts, the order denying the petition can not be vacated for error of law, since it is final as a construction of the will and appealable, and subject to vacation only by the statutory steps. *In re Barker's Estate.* 79

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— Trial of equitable defenses in ejectment. See **EJECTMENT**, 4.

1. **TRIAL BY JURY—WAIVER—NONPAYMENT OF JURY FEE.** Laws 1903, p. 50, requiring an advance payment of \$12 as a jury fee in civil cases, and providing that its nonpayment shall be deemed a waiver of the right to a jury trial, is not in conflict with Const., art. 1, § 21, providing for the waiver of a jury trial only where consent thereto is given, since consent may be either express or implied, as recognized by the laws in force at the time of the adoption of the constitution. *State ex rel. Clark v. Neterer*.... 535
2. **SAME—REASONABLENESS OF FEE.** The jury law of 1903, p. 50, providing for a \$12 jury fee in civil cases is not unconstitutional as imposing any unreasonable conditions upon the right of trial by jury. *Id.*..... 535
3. **JURORS—CHALLENGE FOR CAUSE—HOW WAIVED.** Error in not sustaining challenges to jurors for cause is without prejudice when they were afterwards removed by peremptory challenges, or when the defendant proceeded to trial without removing such a juror or exhausting his peremptory challenges. *State v. Champoux*. 339

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1. **LANDLORD AND TENANT—DISPUTING TITLE OF LANDLORD.** A tenant in possession can acquire no interest by quitclaim deed as against his landlord. *O'Connor v. Jackson*..... 219

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- Cancellation of state. See **PUBLIC LANDS**, 5-12.
- Execution sale of. See **EXECUTION**, 1.
- Notice to quit, not necessary when. See **FORCIBLE ENTRY AND DETAINER**, 5.

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- Against mortgagee in possession. See **EJECTMENT**, 5.
- Against infant investing in outlawed mortgage. See **INFANTS**, 1.
- Not unconscionable defense. See **PLEADINGS**, 6.

1. **SAME—LIMITATION OF SUIT.** Where an action on a bond is commenced within the six months limitation contracted for, a supplemental complaint for further damages arising since the action was commenced is not barred because not filed within six months after the original breach of the bond. *Pacific Bridge Co. v. U. S. Fidelity etc. Co.*..... 47
2. **STATUTE OF LIMITATIONS—MORTGAGES—REVIVAL OF LIEN—SUBSEQUENT JUDGMENT—PRIORITY—ARREST OF STATUTE.** Where the statute of limitations has run against a mortgage, it can not be revived by any act of the mortgagor, as against a subsequent judgment lien, and upon foreclosure contested by the judgment creditor, he should be awarded priority. *De Voe v. Rundle*..... 604

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1. **MARITIME LIENS—MATERIALS FOR CONSTRUCTION OF SHIP FURNISHED BY CONTRACTOR AS AGENT FOR BOTH PARTIES.** Where materials suitable for building wooden ships are placed in charge of the

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manager of a ship building plant with instructions to use them in any ships constructed by him and to sell to the best advantage, the owner has a lien upon a ship for the value of any materials so used in its construction, under § 6077 Pierce's Code, and the fact that such agent is the principal contractor for the construction of the ship and also agent of the ship owners does not defeat the lien, as it does not show a sale on the personal credit of the contractor, or release him as plaintiff's agent to sell the material. *Callahan v. Aetna Indemnity Co.*..... 531

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1. **MARRIAGE—PRESUMED FROM CONDUCT.** In states where the common law marriage is not recognized, proof of the continued cohabitation of a man and woman, holding themselves out to be husband and wife, raises a presumption of a previous legal marriage. *Shank v. Wilson*..... 612
2. **SAME—REBUTTAL—SUBSEQUENT CEREMONY.** The presumption of an earlier marriage from cohabitation and assertion in several states for many years, is not rebutted by proof of a recent ceremonial marriage between the same parties. *Id.*..... 612
3. **SAME—ESTOPPEL.** A widow is not estopped from claiming such earlier marriage by the record in probate proceedings upon her husband's estate showing only the recent ceremonial marriage, and decreeing the marriage between the parties to be of that date. *Id.*..... 612

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1. **MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE MACHINERY—INDEPENDENT CONTRACTOR IN CHARGE OF MILL—CONTRACT TO MAKE REPAIRS—LIABILITY TO EMPLOYEE OF CONTRACTOR.** Where defendant, the owner of a new shingle mill, enters into a contract whereby S, an experienced manufacturer, was to take charge of the mill, employ and pay all laborers and make all necessary repairs, and to receive a stipulated sum per thousand for all shingles manufactured out of timber furnished by defendant, the defendant to furnish new machinery required, which S was to install at his own expense, S stands in the relation of an independent contractor, and not of an agent, and defendant would not be liable for injuries sustained by an employee of S by reason of the machinery getting out of repair, since defendant did not agree to make repairs. *Ziebell v. Eclipse Lumber Co.*..... 531
2. **MASTER AND SERVANT—RAILROADS—NEGLIGENCE—DEATH OF BRAKEMAN—DEFECTIVE COUPLING—PLEADING—COMPLAINT—SUFF-**

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- CIENCY. A complaint alleging the death of plaintiff's decedent, a brakeman, through the negligent use of a defective pin and draw bar in making an unusual and dangerous coupling between a steam shovel and a construction train, states a cause of action where it alleges that the pin was defective in being worn so smooth that it would not hold, that upon complaint, the conductor of the train looked at the coupling, declared it safe, and ordered the brakeman between the cars to set the brakes, which he did, relying upon the conductor's assurance, whereupon he was killed owing to the giving way of the coupling through the defects aforesaid, since there is nothing in the complaint to show that the brakeman made the coupling, or had notice of the nature thereof, or of the defects in the pin. *Grout v. Tacoma Eastern R. Co.*.... 524
3. MASTER AND SERVANT—NEGLIGENCE—DEFECT CAUSING THE MACHINE TO START AUTOMATICALLY—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY. In an action for personal injuries to a sawyer sustained by reason of the automatically starting of a ten-block shingle machine, a verdict for the plaintiff should not be disturbed where there was evidence that the defendant knew that the machine had started up automatically, due to defects in the clutch which were out of sight and not known to plaintiff, that such a machine was unsafe, and that the defect could be remedied by a spring not made or sent out with such machines, that the machine was repaired five days before the accident, there being conflict in the testimony as to whether it was properly repaired and as to every material point, although such machines were in common use without the spring in the clutch. *Towle v. Stimson Mill Co.*..... 305
4. SAME—PROOF OF NEGLIGENCE—VERDICT—CONCLUSIVENESS. While negligence must be shown affirmatively, it may be deduced as an inference from other facts proven, and the courts will not interfere with a verdict where there is substantial conflict in the testimony. *Id.*..... 305
5. SAME—NEGLIGENCE—INSTRUCTIONS. Certain instructions on the subject of negligence held properly refused or sufficiently covered in the general charge. *Id.*..... 305
6. SAME—EVIDENCE OF PRIOR DEFECTS AND REPAIRS. In an action for personal injuries to a servant, evidence of defects in a machine prior to the making of certain repairs, is admissible where the sufficiency of such repairs was one of the main issues in the case. *Id.*..... 305
7. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—CROSS-EXAMINATION OF PLAINTIFF AS TO KNOWLEDGE OF DANGER. In an ac-

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- tion for personal injuries received by falling from an unguarded platform, the plaintiff may be required on cross-examination to testify that he did not look to see if there were guards, as bearing upon the carelessness of his conduct. *Steeple v. Panel etc. Box Co.*..... 359
8. NEGLIGENCE—UNGUARDED PLATFORM—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE—WHEN MATTER OF LAW—NONSUIT. A night watchman who falls from a second story eight foot platform assumes the risk from lack of a railing or is guilty of contributory negligence as a matter of law, where he had worked about the premises for two months, had been on the platform on two other occasions, and had worked thereon for two hours just previous to the accident, and after picking up a lantern fell in turning around without bringing the light to bear, it being a part of his duty to prepare all the light that was necessary. *Id.*.. 359
9. SAME—LACK OF KNOWLEDGE—EVIDENCE. The testimony of the plaintiff that he did not know that there was no guardrail is of no avail where it was his duty to make an examination that would have informed him. *Id.*..... 359
10. MASTER AND SERVANT—ASSUMPTION OF RISKS—INVESTIGATION BY MASTER. The doctrine of assumption of risks imposes no duty upon the servant to make an investigation, where the defect was sufficiently apparent to be the subject of discussion and the master, after examination, pronounced it safe. *Grout v. Tacoma Eastern R. Co.*..... 524
11. SAME—RAILROADS—FELLOW SERVANTS—CONDUCTOR OF TRAIN A VICE-PRINCIPAL. The conductor of a construction train and his brakeman are not fellow servants, but the former is a vice-principal. *Id.*..... 524
12. SAME—ASSUMPTION OF RISK—INSUFFICIENT NUMBER OF MEN. A brakeman assumes all risks from negligence of a railroad company in failing to furnish a sufficient number of brakemen to operate the train. *Id.*..... 524

MECHANICS' LIENS:

— For materials for ship. See MARITIME LIENS, 1.

1. MECHANICS' LIENS—SERVICES OF ARCHITECT—PARTNERSHIP WITH OWNER—LIENABLE AND NON-LIENABLE ITEMS. Where one member of a firm of architects individually enters into a partnership arrangement with the owner of premises, whereby he acquires an interest in a building in consideration of plans and services as an architect in the construction thereof, and subsequently he withdraws from such arrangement in consideration of \$1,500 to be

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paid by the owner, \$900 of which he claims for his interest in the premises, and \$600 for his services as architect, he can not claim a mechanics' lien against the building for the \$900 agreed to be paid in release of his interest in the partnership. *Spaulding v. Burke* 679

2. SAME—APPLICATION OF PAYMENTS—ACCOUNTING WITH ASSOCIATES—RELEASE OF LIEN. Where \$1,000 is paid on such contract, the architect accounts to his firm for the \$600 due for architect's services, such accounting amounts to an application of the payment to the charge for architect's services, and he can not subsequently apply the payment in liquidation of the part of the contract not covering lienable items, nor enforce a mechanics' lien against the building for the balance due. *Id.* 679
3. SAME—FORECLOSURE OF LIEN—PERSONAL JUDGMENT ON FAILURE OF LIEN. In an action to foreclose a mechanics' lien in which the lien fails, personal judgment may be entered against a defendant personally liable for the claim, but without costs incident to the lien. *Id.* 679
4. MECHANICS' LIENS—NOTICE—SUFFICIENCY—STATING TERMS OF CONTRACT. Under Bal. Code, § 5904, the notice of claim for a mechanic's lien need not state the terms and conditions under which the materials were purchased as formerly required by Hills Code, § 1667. *Seattle Lumber Co. v. Sweeney* 691
5. SAME—STATEMENT OF OWNERSHIP OF PROPERTY. Under the liberal construction required by Bal. Code, § 5917, a lien notice stating that the defendants were the owners of the property at the time the materials were furnished authorizes the construction that they are still the owners when the lien notice is filed. *Id.* .. 691
6. SAME—GENERAL LIEN ON SEPARATE BUILDINGS—VALIDITY—POSTPONEMENT TO SPECIFIC LIENS. Bal. Code, § 5907, authorizes a single mechanic's lien against separate lots for five buildings thereon where all are jointly owned by the same parties, and the failure to designate the amount claimed against each building only postpones the general lien to other liens which designate the amount due on specific property. *Id.* 691
7. TIME OF FILING LIEN—COMPLAINT—SUFFICIENCY—CLERICAL ERROR IN NOTICE. Where a complaint for the foreclosure of a mechanic's lien alleges that the plaintiff commenced to furnish material March 19, and finished May 6, a statement that the notice was filed March 10 is clearly a clerical error, and it sufficiently appears to have been filed August 4, when it was expected on that day and the copy attached shows it was filed on that day. *Id.* 691

MECHANICS' LIENS—CONTINUED.

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8. SAME—COMPUTATION OF TIME OF FILING. When the last day of delivery was May 6, the lien claimant had aH of August 4, which was ninety days thereafter, within which to file the lien. *Id.*.... 691

MORTGAGES:

- See CHATTEL MORTGAGES.
 - Application of payments to unsecured account. See PAYMENTS, 1.
 - Community land, by wife alone. See COMMUNITY PROPERTY, 3.
 - Deed, with option to repurchase, is not. See VENDOR AND PURCHASER, 1, 2.
 - Mortgagee in possession, rights of. See CONTRACTS, 4; EJECTMENT, 3, 5.
 - Outlawed, investment in by infant. See INFANTS, 1.
 - Outlawed, revival of. See LIMITATION OF ACTIONS, 2.
1. MORTGAGES—DEED FROM MORTGAGEE—WHEN NOT AN ASSIGNMENT—OPTION TO REPURCHASE. Where an absolute deed is given as a mortgage, a conveyance by the mortgagee at the owner's request to a third person, who pays the debt, is not to be construed as an assignment of the mortgage when the same was made pursuant to an agreement with the owner including additional consideration, and reserved a mere option to repurchase the property. *Reed v. Parker*..... 107
2. MORTGAGES—PRIORITY. Where plaintiff held two notes for \$1000 each, one secured by mortgage upon real and personal property, and the other secured by a chattel mortgage upon entirely different property, and subsequently the debtor secures five notes to R by a mortgage upon real estate and also by chattel mortgages upon part of the personal property described in plaintiff's mortgages, R's real estate mortgage is subject to only one of plaintiff's notes, and a finding that it is subject to both of them is error. *Kelso v. Russell & Co.*..... 474
3. SAME—FORECLOSURE—DECREE—PRIORITY—SEPARATE SALES. In a single action brought to foreclose both of plaintiff's mortgages in which R defends, the decree should provide for the separate sale of the real and personal property covered by the first of plaintiff's mortgages to satisfy the same, applying the balance of the proceeds upon R's mortgage; and the same as to the other of plaintiff's mortgages. *Id.*..... 474
4. SAME—DEED INTENDED AS A MORTGAGE—PLEADING—ISSUES RAISED BY ANSWER AND REPLY—FORECLOSURE. In an action to set aside a deed upon the ground of undue influence and coercion,

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where the answer alleges that the conveyance was made to defendants in consideration of money loaned to plaintiff to pay the purchase price and improve the property, and prays that if the deed be construed as a mortgage, the amount due be ascertained and the same be foreclosed, and issue is joined thereon by the reply, a decree of foreclosure is within the issues, and should be awarded where the evidence justifies such conclusion. *Butler v. Carvin*..... 621

5. **SAME—EVIDENCE—ADMISSION IN BRIEF.** Where the appellants' brief shows a willingness to treat their absolute deed as a mortgage, foreclosure thereof will be decreed by the supreme court, although the evidence tends to show an absolute deed between members of a family, made to discharge an equity for large advances on the purchase price and improvements, and that the parties had contemplated living together on the property, but failed to agree. *Id.*..... 621

MOTIONS:

- See PLEADINGS.

MUNICIPAL CORPORATIONS:

- Bond, city as obligee. See INDEMNITY, 2.
- Bond on appeal, exemption from giving. See APPEAL AND ERROR, 13.
- Election for first officers of consolidated city, time for holding. See STATUTES, 1-3.
- Negligence, of builder under building permit. See NEGLIGENCE, 1.
- Official paper, award. See NEWSPAPERS, 1-5.
- Ordinances, injunction against enforcement. See INJUNCTION, 1.
- Plat of town, construction. See DEDICATION, 1.

1. **MUNICIPAL CORPORATIONS—CHARTER—AMENDMENTS—CLERICAL ERROR IN NOTICE.** An amendment to a section of a city charter relating to the filing of claims against the city is not invalidated by a clerical error in referring to the same as § 29, art. 8, in the resolution and notice submitting the same to a vote of the people, when it clearly appears from the section set out in full that § 29, art. 4, was intended. *Ehrhardt v. Seattle*..... 664
2. **SAME—SUBMISSION OF AMENDMENTS—RESOLUTION OF CITY COUNCIL—LEGISLATIVE ACT.** A city council may submit amendments to the city charter to a vote of the people by a resolution, when the charter provision relating thereto simply provides that

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- the amendments shall be "proposed" in the city council, since such resolution is temporary and ministerial in its nature, and is not a legislative act within the requirement of the charter that all legislative acts shall be by ordinance. *Id.*..... 664
3. MUNICIPAL CORPORATIONS—ACTIONS—PRESENTING CLAIMS—EXCUSE FOR FAILURE TO PRESENT IN TIME. Where a claim was presented on the 31st day after the injury, a sufficient excuse for failure to present the claim within 30 days, as required by the charter, is shown by an allegation in the complaint that plaintiff was disabled by the injury from attending to any business for more than thirty days and that he presented the claim as soon as he was able to determine the extent of his injuries; and sustaining a demurrer to such a complaint is error, since plaintiff's incapacity is a question of fact for the jury. *Id.*..... 664
5. MUNICIPAL CORPORATIONS—ORDINANCES—REGULATION OF PLATING ADDITIONS TO CITY—VALIDITY. The fact that a section of a municipal ordinance regulating the filing of plats of additions affects lands outside the city does not invalidate the remainder as to lands within the city. *Hillman v. Seattle*..... 14
6. SAME—DISCRETION OF CITY COUNCIL—ULTRA VIRES. The Seattle municipal code of 1892, §§ 747-750, requiring plats of city additions to be approved by the city council if, upon report by the city engineer, the streets are found to coincide with other streets in the city, vests discretionary powers in the council, and does not absolutely require that they shall so coincide, and injunction will not lie to restrain the enforcement of the ordinance as ultra vires, or because the council may abuse its discretion, unless compliance is made impossible or unreasonable by the council's construction thereof. *Id.*..... 14
7. SAME—REGULATIONS AS TO PAYMENT OF TAXES. An ordinance making the payment of city taxes a prerequisite to the filing of any plat as an addition to the city is not an unreasonable regulation. *Id.*..... 14
8. SAME—COMPLAINT—SUFFICIENCY. A complaint to enjoin the enforcement of an ordinance regulating the filing of plats of additions to the city is insufficient when it fails to allege the necessary preliminary steps for approval of a plat, since it may be finally approved by the council. *Id.*..... 14
9. SAME—TITLE OF ORDINANCE. The objection that the title of an ordinance is not broad enough to include the penalty, will not be considered in a suit to enjoin its enforcement, when it does not affect other portions of the act. *Id.*..... 14

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10. MUNICIPAL CORPORATIONS—ENFORCING VOID ORDINANCE—LIABILITY FOR ACTS OF POLICE OFFICERS—CITY AS STATE INSTRUMENTALITY—DAMAGES FOR UNAUTHORIZED ARREST. A municipal corporation is not liable for the acts of its police officers in arresting and prosecuting a person under a void ordinance requiring bicycles to be licensed, although the city receives the benefit of the license fee and its law officers conducted the prosecution, since the damage arises in the performance of a duty imposed upon the city as a public instrumentality of the state. *Simpson v. Whatcom* 393
11. SAME—FEES COLLECTED FOR THE BENEFIT OF CITY. The fact that the city received the benefit of the license fees does not make the duty a purely corporate one, as the legislature may distribute the revenue therefrom as it sees fit, and the city is liable only where the officers are acting for the city's exclusive benefit. *Id.*.. 393
12. SAME—POLICE POWERS—BICYCLES. Bicycles are vehicles and their use upon the public streets of a city is a proper subject for police regulation in the interests of public safety, to be enforced by the city acting as an instrumentality of the state. *Id.*..... 393
13. MUNICIPAL CORPORATIONS—CONTRACTS FOR STREET IMPROVEMENTS—CONSTRUCTION—CITY ENGINEER—LIABILITY OF CITY FOR NEGLIGENCE OF AGENT. A contract between a city and two contractors whereby one was to pay the other for the removal of gravel from certain streets a specified sum per yard for "5000 cubic yards, more or less as may be designated by the city engineer," plainly refers to the amount and not to the location of the gravel, and a complaint for the unskillfulness of the city engineer in measuring said gravel, pursuant to such contract, relates to his official duties and sufficiently states the liability of the city for the negligent act of its agent. *Normile v. Ballard*..... 369
14. SAME. A city is liable for the negligence and unskillfulness of its city engineer in estimating the amount of gravel moved by a contractor under a street grading contract, when thereby another contractor was, under the terms of a contract with the city, forced to pay a sum largely in excess of the amount due for such work. *Id.*..... 369
15. SAME—CONTRACT OF CITY—CONSIDERATION—LIABILITY FOR NEGLIGENCE OF CITY ENGINEER. Where the city and two separate contractors on street improvements enter into a contract whereby one contractor is to pay the other 20 cents per cubic yard for all gravel placed in a certain street, the amount to be determined by the city engineer, and which contract was made for the purpose of enabling the contractors to complete their contracts, suffi-

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cient consideration on the part of the city, making it liable on the contract for the neglect of the city engineer, is shown by the fact that the value of removing the gravel was 35 cents per yard, 15 cents of which was to be paid by the city, and that thereby the city was relieved from the payment of 20 cents of such charge. *Id.* 369

16. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—CONSTRUCTIVE NOTICE OF DEFECT—OTHER ACCIDENTS—PROOF OF ADMITTED FACTS. In an action against a city for personal injuries sustained by falling over an obstruction in the sidewalk, it is not reversible error for the plaintiff to show other instances of persons falling over the obstruction to prove constructive notice, although the city admitted notice by stipulation, since proof of admitted facts is not prejudicial error. *Smith v. Seattle*..... 481
17. SAME. Such testimony was also admissible as descriptive of the place, and is not objectionable as being in the nature of a surprise to the city. *Id.*..... 481
18. SAME—TRAP DOOR IN SIDEWALK—EVIDENCE AS TO OTHER DOORS. Where a trap door was maintained in the sidewalk projecting several inches above the level of the walk, evidence that no other trap doors in the city approximated the same height is not prejudicial to the city as such fact was to its credit and not to show other acts of negligence. *Id.*..... 481
19. SAME—CONTRIBUTORY NEGLIGENCE. Such evidence was also admissible upon the issue of plaintiff's contributory negligence, if the city was negligent in maintaining the door in question. *Id.* 481
20. SAME—EVIDENCE—SUFFICIENCY. Evidence that a trap door projected above the level of the sidewalk from two to four inches, and was worn very smooth and slippery, raises a question for the jury as to the city's negligence. *Id.*..... 481
21. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENCE—EVIDENCE AS TO OTHER SIDEWALKS. In an action for personal injuries caused by stepping into a small hole at the edge of the sidewalk, testimony on the part of the city that the sidewalk was built upon the same plan and that the opening was the same as generally adopted in many other sidewalks throughout the city, is inadmissible. *Stone v. Seattle*..... 644
22. SAME. Neither could the city prove that the sidewalk was like the sidewalks in many other cities. *Id.*..... 644
23. SAME—NECESSITY OF HOLE IN SIDEWALK. Neither could the city prove that the opening was necessary for the purpose of disposing of surface water, since it is a matter of common knowledge that surface water may be otherwise disposed of. *Id.*..... 644

MURDER:

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See **CRIMINAL LAW**, 2, 3, 23-26, 38, 39; **INDIANS**, 1-2.

NAVIGABLE WATERS:

— Meander as boundary. See **WATERS**, 1.

NEGLIGENCE:

See **BRIDGES**; **EXPLOSIVES**; **MASTER AND SERVANT**.

— Carriers, limiting liability. See **CARRIERS**, 1.

— Damages for, excessive. See **DAMAGES**, 1.

— Independent contractor. See **MASTER AND SERVANT**, 1.

— Indemnifying against. See **INDEMNITY**, 4-7.

— Sidewalks. See **MUNICIPAL CORPORATION**, 16-23.

— Physical examination of plaintiff. See **WITNESSES**, 3.

1. **MUNICIPAL CORPORATIONS—NEGLIGENCE—LIABILITY FOR ACT OF BUILDER—DEATH OF PEDESTRIAN IN STREET—BUILDING PERMIT—WARNING.** A city, by granting a building permit and failing to give notice of the danger in using a street, does not render itself liable for the death of a pedestrian in front of a building under construction, who was struck by a timber negligently thrown down by the party constructing the building. *Copeland v. Seattle* 415

NEGOTIABLE INSTRUMENTS:

— Annual interest, not compound. See **INTEREST**, 1.

— Note to secure future advances, application of payments. See **PAYMENTS**, 1.

— Notes separately secured, priority. See **MORTGAGES**, 2.

NEWSPAPERS:

1. **NEWSPAPER—WHAT IS—SUFFICIENCY OF EVIDENCE.** The Daily Bulletin, a paper of four pages, each thirteen by twenty inches with five columns of regular printed matter, devoted to the dissemination of news upon a great variety of topics of interest to the general public and containing general advertisements, but giving special prominence to legal news, is a "newspaper" within § 31, Seattle city charter, relating to the selection of an official city paper, and within the usual acceptance of the term. *Puget Sound Pub. Co. v. Times Printing Co.*..... 551
2. **SAME—GENERAL CIRCULATION—NEED NOT BE UNIVERSAL.** A paper having 750 to 1000 subscribers in the city of Seattle, daily distributed to them, and read by about 3000 persons, is a paper of "general circulation," since general means extensive and not universal. *Id.*..... 551

NEWSPAPERS—CONTINUED.

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3. DAILY PAPER—HOLIDAYS EXCEPTED. A paper published every day except Sundays and legal holidays is a daily paper. *Id.*..... 551
4. MUNICIPAL CORPORATIONS—OFFICIAL PAPER—LETTING AWAR—CITY COUNCIL—DISCRETION—ABUSE. Under a city charter requiring the city printing to be awarded to the lowest bidder, the city council, although vested with some discretion in determining which is the lowest bid, cannot arbitrarily award the printing in plain disregard of the provisions, and the courts will restrain an award at 40 cents an inch where a qualified competitor has bid less than 16 cents per inch. *Id.*..... 551
5. SAME—HIGHEST BIDDER—ACTION TO ENJOIN AWARD—EVIDENCE AS TO AVERAGE PRICE. In an action to restrain a city council from letting the public printing to the highest bidder, in violation of charter provisions, evidence as to the average price paid and as to the reasonableness of the defendant's bid is properly excluded as immaterial. *Id.*..... 551

NEW TRIAL:

- Application for, review of discretion. See APPEAL AND ERROR, 33.
 - Motion for, not necessary. See APPEAL AND ERROR, 11.
1. NEW TRIAL—POINT NOT RAISED AT TRIAL. A new trial is properly refused upon the mere offer of evidence upon a point not raised at the trial after full opportunity to do so. *Collins v. Fidelity Trust Co.*..... 136

NOTARY PUBLIC:

- Principal in bond, may take justification of securities. See APPEAL AND ERROR, 15.

NOTICE:

- Of amendments to city charter. See MUNICIPAL CORPORATIONS, 1.
- Of application for tax deed. See TAXATION, 3.
- Of assessment of taxes. See TAXATION, 1, 2.
- Bona Fide purchaser, who is. See EJECTMENT, 3, 5; EXECUTORS AND ADMINISTRATORS, 10.
- Of defect in sidewalk. See MUNICIPAL CORPORATIONS, 16.
- Of expulsion, to insane member. See BENEFICIAL ASSOCIATIONS.
- Of findings. See APPEAL AND ERROR, 23.
- Of forfeiture of policy. See INSURANCE, 1.
- Of infringement of trade-mark. See TRADE-MARKS, 3.

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- Of lien. See **MECHANICS' LIENS**, 4, 7, 8.
- Of pendency of suit. See **INDEMNITY**, 4-7.
- Of sale under execution. See **EXECUTION**, 1.
- Of sale of county property, error in, caption no part of. See **COUNTIES**, 1, 2.
- To quit. See **FORCIBLE ENTRY AND DETAINER**, 5.

NUISANCE:

- Action to restrain, transfer of interest, substitution of parties. See **ABATEMENT**, 1.

OFFICERS:

- Attempt by to correct error in notice of sale. See **COUNTIES**, 2.
- De facto judge. See **JUDGES**, 1, 2.
- Engineer, liability of city for unskillfulness. See **MUNICIPAL CORPORATIONS**, 13-15.
- Police, liability of city for arrest by. See **MUNICIPAL CORPORATIONS**, 10-12.

OPTION:

- To repurchase land. See **VENDOR AND PURCHASER**, 1.

PARTIES:

- Capacity of executor to sue for death of testator. See **DEATH BY WRONGFUL ACT**, 1.
 - Substitution on transfer of interest. See **ABATEMENT**, 1.
1. **PARTIES—FAILURE TO SERVE PRINCIPAL DEFENDANT—LIABILITY OF SURETY.** In an action on a joint and several bond, an objection to any evidence because of the failure to bring the principal into court is properly overruled, since the statute authorizes a joint or several suit at the option of the plaintiff. *Pacific Bridge Co. v. U. S. Fidelity etc. Co.*..... 47

PARTNERSHIP:

1. **PARTNERSHIP—CONTRACT OF INDIVIDUAL MEMBER—ATTORNEYS—SERVICES.** One member of a law firm may contract for employment without disclosing the partnership, the general principles of partnership applying, and such a contract on behalf of the firm is shown entitling the firm to sue thereon where the firm entered an appearance in the case and corresponded with the client in reference to a discharge and services. *Dennis v. First Nat. Bank of Seattle*..... 161

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2. **SAME—PLEADINGS—VARIANCE.** Under a complaint alleging an express contract for employment made by a firm of attorneys there is no variance warranting a nonsuit where the proof shows a contract made by one member for the benefit of the firm, but without disclosing the partnership. *Id.*..... 161

PAYMENT:

- Application of, to nonlienable items, by an accounting. See **MECHANICS' LIENS**, 2.
 - Application of rents to interest. See **CONTRACTS**, 4.
 - As estoppel to claim damages for breach of contract. See **PLEADINGS**, 9.
 - Of consideration, under oral agreement to sell land. See **COMMUNITY PROPERTY**, 2.
1. **PAYMENTS—APPLICATION—NOTES TO SECURE FUTURE ADVANCES—OPEN ACCOUNT.** Where notes and mortgages were given in part to secure payment for future advances of merchandise from the mortgagee to the mortgagor, between whom there was an open book account before and after the notes were given, payments may be applied by the creditor to the open account, in the absence of directions by the mortgagor; and a subsequent mortgagee can not object to such application where it appears that the amount of the notes had been advanced, and no part paid, and that all credits had been given to the open account, which was not part of the notes. *Kelso v. Russell & Co.*..... 474

PENDENCY OF SUIT:

- Notice of. See **INDEMNITY**, 4, 5.

PHYSICIANS:

- Privileged communications. See **WITNESSES**, 2.
- Selection by court, credibility. See **WITNESSES**, 3.

PLATS:

- Of addition to city, regulation. See **MUNICIPAL CORPORATIONS**.
- Of town, construction. See **DEDICATION**, 1.

PLEADINGS:

- Amendment of, when not allowed. See **EJECTMENT**, 5.
- Answer, equitable. See **EJECTMENT**, 3-4.

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- Complaints, sufficiency of. See EXPLOSIVES, 1, 2; FORCIBLE ENTRY AND DETAINER, 1; INDEMNITY, 1; MASTER AND SERVANT, 2; SUBSCRIPTION, 1; TRADE-MARKS, 1-3. To enjoin foreclosure. See CHATTEL MORTGAGES, 1. To enjoin enforcement of penal ordinance. See MUNICIPAL CORPORATIONS, 8.
 - Counter claim, when does not affect account stated. See SALES, 2.
 - Counter claim, for removal of lateral support in action to enjoin flow of waters. See WATERS, 2.
 - Demurrer, does not reach indefiniteness. See CERTIORARI, 1.
 - Demurrer, necessary to take advantage of failure to surrender upon rescission. See CANCELLATION OF INSTRUMENTS, 1.
 - Motions, to dismiss action, grounds. See ACTIONS, 2. For new trial, unnecessary. See APPEAL AND ERROR, 11. Waiver, by going to trial. See APPEAL AND ERROR, 35.
 - Motion of court, premature judgment. See JUDGMENTS, 2.
 - Variance, what issues are within pleadings. See APPEAL AND ERROR, 45; FRAUD, 1, 2.
1. DEMURRER—ERROR—WAIVER BY PLEADING OVER. Error in sustaining a demurrer to a complaint is waived by the filing of an amended complaint. *Reed v. Parker*..... 107
 2. DEMURRER—SEVERAL CAUSES OF ACTION. A general demurrer for want of sufficient facts, where there are two causes of action, is properly overruled where the second cause of action is properly stated. *Meals v. De Soto Placer Min. Co.*..... 302
 3. PLEADINGS—LIBERAL CONSTRUCTION. A complaint is to be liberally construed upon demurrer and all reasonable intendments made in its favor. *Grout v. Tacoma Eastern R. Co.*..... 524
 4. SAME—PLEADING—SUPPLEMENTAL COMPLAINT. In an action on a subcontractor's bond to recover the amount of indebtedness which he had incurred and refused to pay, it is proper to allow a supplemental complaint for the recovery of further damages incurred in completing the work after the action was commenced which was the result of the same breach. *Pacific Bridge Co. v. U. S. Fidelity etc. Co.*..... 47
 5. PLEADINGS—DENIAL—SUFFICIENCY—AMENDMENT PRESUMED. An answer stating that truthful and untruthful declarations are so intermingled that it is impossible to segregate the allegations and that therefore defendant denies each and every part thereof is not bad as an admission, and may be considered as amended when objected to for the first time in the supreme court. *Turner v. Turner* 118

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6. PLEADINGS—AMENDMENT—LIMITATION OF ACTION—STATUTE NOT UNCONSCIONABLE DEFENSE—SETTING UP IN AMENDED PLEADING. The statute of limitations is not an unconscionable defense, and the allowance of an amended pleading for the purpose of setting it up is not to be discriminated against, but should be treated as any other defense. *Thomas v. Price*..... 459
7. SAME. Great latitude is allowed in the amendment of pleadings, and it is not error to allow a trial amendment pleading the statute of limitations to a note, where the defendant was not surprised and made no application for a continuance. *Id.*..... 459
8. PLEADINGS—MOTION FOR JUDGMENT. Where the complaint is sufficient and the answer contains no legal defense, judgment on the pleadings is properly entered for the plaintiff. *Morris v. Healy Lumber Co.*..... 451
9. PLEADING—COUNTERCLAIM—DAMAGES FOR BREACH OF CONTRACT—ESTOPPEL—PLEADING PAYMENT IN FULL. In an action upon a contract for architects's services, the defendant, by attempting to show a voluntary payment in full is estopped to claim damages for defective work under a counterclaim which fails to allege that the defects causing the damage arose after the payment and could not reasonably have been discovered prior to that time. *Spaulding v. Burke*..... 679
10. PLEADING—VARIANCE. Where the complaint alleges a contract of sale, and the answer sets up a conditional sale denying that the machine was as represented, upon which defense the case was tried, the defendant cannot complain of a variance between the complaint and proof. *Meals v. De Soto Placer Min. Co.*..... 302
11. PARTNERSHIP—VARIANCE. A variance from an express contract of employment by a firm of attorneys is not shown by proof of a contract made by one member for the benefit of the firm without disclosing the partnership. *Dennis v. First Nat. Bank of Seattle* 161

POLICE JUDGE:

See JUDGES, 1, 2.

POLICE POWER:

— Regulation of bicycles. See MUNICIPAL CORPORATIONS, 10-12.

POWER OF ATTORNEY:

— To execute bond. See PRINCIPAL AND AGENT, 1.

PREMIUM:

— Prepayment of. See INDEMNITY, 8.

PRESCRIPTION:

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- Right to use street. See ADVERSE POSSESSION, 3, 4.

PRINCIPAL AND AGENT:

- Contractor of ship representing both parties. See MARITIME LIENS, 1.
- Independent contractor, when not an agent. See MASTER AND SERVANT, 1.
- Liability of city for unskilfulness of engineer. See MUNICIPAL CORPORATIONS, 13-15. For acts of police officers. See MUNICIPAL CORPORATIONS, 10-12.
- Proof of agency, when material to a defense of rescission. See SALES, 4.

1. INSURANCE—GUARANTY—AUTHORITY OF AGENTS—POWER OF ATTORNEY—CONSTRUCTION. A letter of attorney authorizing an insurance agent to execute as attorneys in fact all bonds guaranteeing the fidelity of persons "and the performance of contracts other than insurance policies," is sufficiently broad to authorize a contract guaranteeing the repayment of money loaned by a bank for the purpose of completing the construction of a vessel, Laws of 1897, pp. 332, 333, recognizing such indemnity obligations. *Pacific Nat. Bank v. Aetna Indemnity Co.*..... 428
2. SAME—EVIDENCE OF AUTHORITY. The charter of the company reciting the same powers is also properly received in evidence to show the agent's authority. *Id.*..... 428
3. SAME—PRINCIPAL AND AGENT—LOCAL AGENT REPRESENTING BOTH PARTIES—BOND TO AGENTS PRINCIPAL—APPROVAL AND REPRESENTATION BY GENERAL AGENT. The bond of a surety company guaranteeing the repayment of a loan made to S as trustee for ship builders, for the purpose of completing the construction of a ship, which provided that it should not be valid until signed on the part of the company by S, who was its district agent, and which bond is signed by S, trustee, as principal in the bond, and also as district agent for the company, is not on that account void on the theory that S acted as agent for both principal and surety, where it further appears that it was executed and delivered in the presence of the general agents, who secured the loan by representations as to the surety company's interest in the construction of the ship, and the bond was also signed by them, and S, who was a subordinate agent, signed as district agent at their request, the clause requiring such district agent to sign having been inserted by the general agents without being required by the company. *Id.*..... 428

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4. **SAME—KNOWLEDGE—RATIFICATION.** Such signing by the district agent must be held to have been with the knowledge and consent of the company, the general agents having acted within the scope of their authority, and in good faith, and there being no evidence that the agent was secretly acting for both parties. *Id.* 428
5. **SAME—CLAUSE IN BOND REQUIRING SIGNATURE BY DISTRICT AGENT—EXECUTION BY GENERAL AGENTS.** Where general agents of a surety company appoint a district agent, and, without the company's requirement, insert a clause that the bond shall not be valid until signed by the district agent, a bond signed by the general agents, under a letter of attorney empowering them to sign all bonds, does not require the signature of the district agent as such, where he is the principal in the bond. *Id.*..... 428

PRINCIPAL AND SURETY:

- Bond signed by agent for both principal and surety. See **PRINCIPAL AND AGENT**, 3-5.
 - Parties, principal not served. See **PARTIES**, 1.
 - Release of surety by alterations, construction. See **INDEMNITY**, 3.
1. **SAME—DISCHARGE OF SURETY—ALTERATIONS IN PLANS.** The surety of a subcontractor is not discharged by alterations in the work called for, when the contract authorized the city engineer to make the changes complained of. (*Cowles v. United States Fidelity & Guaranty Co.*, 32 Wash. 120, followed.) *Pacific Bridge Co. v. U. S. Fidelity etc. Co.*..... 47

PROCESS:

- Summons, when returnable. See **FORCIBLE ENTRY AND DETAINER**, 3.
1. **ACTIONS—COMMENCEMENT—SUMMONS BY PUBLICATION—FILING AFFIDAVIT OF NONRESIDENCE—DELAY.** A delay of three days after the verification in filing an affidavit of nonresidence on which publication of a summons in a tax lien foreclosure was secured, is not a fatal defect in the service invalidating the judgment, where no change occurred during the delay after making the affidavit, and there was no actual injury caused thereby. *Whitney v. Knowlton* 319

PROSECUTING ATTORNEY:

- Deputy, authority of. See **CRIMINAL LAW**, 1.

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- Of summons. See **PROCESS**, 1.

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- Leasehold in, how sold. See EXECUTION, 1.
- Meander of lake as boundary. See WATERS, 1.

1. **PUBLIC LANDS—HOMESTEAD—EXEMPTION FROM DEBTS—HEIR'S PREFERENCE RIGHT TO ENTER—ADMINISTRATOR'S SALE—VALIDITY.** Where a settler upon unsurveyed public lands dies without heirs who are citizens of the United States, his administrator cannot sell the improvements and right of possession to pay debts and expenses of administration, but the land is again open to settlement, since heirs do not succeed by right of inheritance, but only by virtue of a preference as new homesteaders, if qualified, and the homestead is exempt from debts. *Towner v. Rodegeb...* 153
2. **SAME—SETTLER ON UNSURVEYED LANDS—EXEMPTIONS.** The exemption from debts contracted prior to patent applies with equal force to improvements on unsurveyed land before entry, and after as well as before the death of the settler, and to administrators' as well as execution sales. *Id.*..... 153
3. **TIDE LANDS SALES—IMPROVEMENTS—APPRAISEMENT—RAILROADS.** A railroad across tide lands constructed on piles and trestle work is not an improvement entitling the owner to have the same appraised before sale of the tide lands, within the meaning of Laws of 1897, p. 231, defining improvements to be "fills of a permanent character and all structures used for trade, business, commerce or residence, excepting capped piles and similar structures or fixtures," since the statute contemplates structures which enhance the value of the land. *Lake Whatcom Logging Co. v. Callvert...* 126
4. **SAME—ACTION TO ANNUL SALE—EMINENT DOMAIN.** A state contract for the sale of tide lands made without appraisal of improvements will not be annulled at the suit of a common carrier, the owner of a railroad built on piles across the same, since the appraisal of the road as an improvement would compel the purchaser to pay its value without acquiring title to the materials composing it, and a right of way could subsequently be condemned upon paying the value of the land taken without regard to the value of the improvements thereon. *Id.*..... 126
5. **PUBLIC LANDS—LEASE FROM STATE—FORFEITURE—POWER OF COMMISSIONER OF PUBLIC LANDS.** A lease of tide lands made in accordance with the provision of Laws 1897, p. 253, as amended by Laws 1897, pp. 242-244, and Laws 1899, p. 139, can not be cancelled by the commissioner of public lands for any cause except nonpayment of rent, as authorized by § 25, Laws 1897, p. 244, and the commissioner's unauthorized cancellation of a lease is mere nullity. *State ex rel. Russell v. Callvert.*..... 380

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6. TIDE LANDS—STATE DEED TO THE UNITED STATES—USE FOR MAINTAINING FORTS—TITLE TO UPLAND NOT HELD BY THE GOVERNMENT. A deed of tide lands from the state to the United States, made under Laws 1890, p. 428, purporting to grant the use of such tide lands for the purpose of maintaining forts, etc., is invalid where such tide lands did not border upon upland held or reserved by the United States government for the purposes specified, as required by said act authorizing a deed from the state. *Id.* 330
7. SAME—RIGHTS OF PRIOR LESSEE. Nor could such a deed abrogate the rights of a prior lessee of such tide lands, under a valid lease from the state, Laws 1897, p. 243, providing that lands held under lease shall not be offered for sale except to the lessee. *Id.*... 330
8. SAME—PURCHASE FROM STATE NOT AUTHORIZED BY CONSENT TO ACQUIRE TITLE FROM OTHERS. Laws 1890, p. 459, and Laws 1891, p. 31, granting the consent of the state to the purchase or condemnation by the United States, of lands owned by individuals or bodies politic or corporate within the state, in accordance with United States constitution, Art. 1, § 8, clause 17, were not intended to authorize a purchase from the state, and the acceptance by the United States of a deed from the state is not authorized by said laws as a purchase from a body politic. *Id.*..... 330
9. SAME—GRANT OF STATE LANDS FOR LAKE WASHINGTON SHIP CANAL—RIGHTS OF PRIOR LESSEES. Laws 1901, p. 7, granting to the United States the right to construct a ship canal connecting Lakes Union and Washington with Puget Sound through and over all state lands in King county, was not intended to annul existing leases of state tide lands made by the state to private parties, since such an attempt would be unconstitutional. *Id.*.... 330
10. SAME. As such grant is general, it probably was not intended to convey the fee of leased lands, in view of Laws 1897, p. 243, prohibiting their sale. *Id.*..... 330
11. SAME. Even if the fee was conveyed, it would be subject to the lease, and the commissioner of public lands could not exonerate himself from accepting rent by his arbitrary and illegal act of cancelling the lease. *Id.*..... 330
12. MANDAMUS—COMPELLING COMMISSIONER OF PUBLIC LANDS TO RECOGNIZE VALID LEASE OF TIDE LANDS. Under Bal. Code, § 5755, providing that a writ of mandamus may issue to any inferior tribunal, board or person, to compel the performance of a duty especially enjoined by law, or the admission of a party to the enjoyment of a right from which he is unlawfully precluded, mandamus is the proper remedy to compel the commissioner

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of public lands to accept rent due under a valid lease of tide lands which he has unlawfully cancelled and refuses to recognize. *Id.* 380

PUBLIC POLICY:

- Agent representing both parties, validity of contract. See PRINCIPAL AND AGENT, 3-5.

PUBLIC USE:

- What is. See EMINENT DOMAIN, 2, 3.

QUIETING TITLE:

- Refused where based on mortgage executed by wife alone. See COMMUNITY PROPERTY, 3.

RAILROADS:

- Conductor and brakeman not fellow servants. See MASTER AND SERVANT, 11.
- Contract for subsidy. See SUBSCRIPTION, 1.
- Negligence, limiting liability by contract. See CARRIERS, 1, 2.
- Negligence in coupling. See MASTER AND SERVANT, 2.
- Number of brakeman, risks assumed. See MASTER AND SERVANT, 12.
- On tide lands, not an improvement. See PUBLIC LANDS, 3, 4.
- Private way to depot. See ADVERSE POSSESSION, 4; DEDICATION, 1.

RAPE:

- See CRIMINAL LAW, 11-15.
- Killing while in perpetration of. See CRIMINAL LAW, 38.
- Evidence of other offenses. See CRIMINAL LAW, 11.

RATIFICATION:

- Of compromise. See APPEAL AND ERROR, 22.
- By general agent. See PRINCIPAL AND AGENT, 4.

RECEIVERS:

- Right to mortgaged chattels, leave of court to foreclose, possession. See CHATTEL MORTGAGES, 3, 4.

1. RECEIVERS—APPOINTMENT TO COLLECT RENTS—GROUNDS—SUFFICIENCY OF SHOWING. In an action to recover the possession and rents and profits of tide lands at the mouth of a river claimed for

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- booming purposes and adversely held by a rival company, the appointment of a receiver *pendente lite* is not warranted by a showing of plaintiff's legal title, that plaintiff had lost a profit of \$15,000 on logs boomed by defendant by being kept out of possession, that defendant's capital stock was only \$2,000, and it had no property from which damages could be collected, where there was no showing that logs would be boomed during the pendency of the suit, or that plaintiff would be entitled to the tolls thereon through contracts with the owners, or that it had the necessary appliances for booming purposes, or that defendant was mismanaging or injuring the property in dispute. *Union Boom Co. v. Samish Boom Co.*..... 144
2. SAME—LEGAL TITLE OF PLAINTIFF. Proof of a valid legal title in the plaintiff is insufficient in itself to warrant the appointment of a receiver without a showing of imminent danger or loss of rents and profits by reason of the mismanagement or insolvency of the defendant. *Id.*..... 144
3. SAME—DISCRETION—REVIEW. The discretion of the trial court upon appointing a receiver is not absolute, and the proofs will be examined, and the decision reversed if there is a clear preponderance of the testimony against it. *Id.*..... 144

RENTS:

- Assigned as security. See CONTRACTS, 4; EJECTMENT, 3.

RESCISSION:

- Of contract for fraud. See CANCELLATION OF INSTRUMENTS, 1.
 — Of sale of goods. See SALES, 4-6.
 — Of life insurance, by default. See INSURANCE, 1.

RESERVATION:

- Offenses committed on. See INDIANS, 1, 2.

REVIVAL:

- Of judgment. See JUDGMENTS, 6-8.

RIGHT OF WAY:

- For logging road. See EMINENT DOMAIN, 1-6.
 — For water flume. See ALIENS, 1-3.

RULES OF COURT:

- See APPEAL AND ERROR, 30.

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- Abrogated by new contract. See **CONTRACTS**, 2.
- County lands. See **COUNTIES**, 1, 2.
- Conditional, when not a variance. See **PLEADING**, 10.
- Demand for balance due, when unnecessary. See **ACTIONS**, 1.
- Execution. See **EXECUTION**.
- Executors, to pay debts. See **EXECUTORS AND ADMINISTRATORS**, 8.
- Material for ship, when not on personal credit. See **MARITIME LIENS**, 1.
- Mortgage foreclosure sales, when to be separate. See **MORTGAGES**, 3.
- Real estate. See **VENDOR AND PURCHASER**, 1, 2; **COMMUNITY PROPERTY**, 2.
- Tide lands. See **PUBLIC LANDS**.

1. **SALES—VALIDITY—GOODS NOT IN ESSE.** The objection that a sale of logs is void because they were not in existence at the time the sale was made, can not be urged by the purchaser after the contract is fully executed except as to paying the purchase price *Ketchum v. Stetson & Post Mill Co.*..... 92
2. **SALES—AGREED PRICE—STATEMENT OF ACCOUNT—CONCLUSIVENESS.** An agreed price for goods sold is sufficiently shown by the vendor, where the vendee made a statement of the account at the price contended for, and such statement is conclusive as to the items specified, notwithstanding a disputed counterclaim for damages. *Id.*..... 92
3. **SALES—IMPLIED WARRANTY—LATENT DEFECT—INJURY TO MILL BY.** There is no implied warranty rendering the vendor of a boom of logs responsible for injuries to the vendee's mill by reason of a piece of iron imbedded in one of the logs, when the vendor was not the manufacturer and had no notice of the defect and the vendee inspected the logs before running them through his mill. *Id.*..... 92
4. **SALES—RESCISSION—AGENCY—SUFFICIENCY OF EVIDENCE.** Where defendant, a broker, paid a draft accompanying a consignment of fruit by a check to a collecting bank, which thereupon delivered the bill of lading to the defendant and gave notice to the drawer that the draft was paid, and defendant attempted to rescind the contract and stopped payment of the check upon discovering defects in the goods, in an action on the check the issue tendered in defendant's answer that the collecting bank was agent of the consignor is material to his defense of rescission, and is not supported by proof that it may have been agent for the consignor's bank, for the purpose of collection. *Seattle Nat. Bank v. Powles.* 21

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5. SAME. The draft appearing to have been purchased by the forwarding bank, the collecting bank rendered itself liable by delivering the bill of lading and giving notice that the draft was paid, and as these acts were instigated by the defendant, he must suffer the loss. *Id.*..... 21
6. SAME—ESTOPPEL. The defense of rescission in *toto* of a contract upon which goods were consigned cannot be maintained where the defendant surrendered the bill of lading to the carrier, removed and sold a portion of the goods, retains the proceeds thereof, together with overcharges collected on the freight prepaid by the consignor, and stopped payment on his check only after notice had been given by the collecting bank that the draft was paid. *Id.*..... 21
7. SAME—EVIDENCE—CUSTOM. In such a case it was competent to admit testimony on the part of the plaintiff as to what became of the goods and proceeds, and the rejection of evidence as to the custom of merchants as to the disposition of goods upon such consignments was not prejudicial error. *Id.*..... 21
8. SALES—STOCK OF GOODS IN BULK—PRIVATE SALE OF BALANCE AFTER AN AUCTION. Where a storekeeper commenced selling her stock of dry goods and notions at auction January 20, realizing \$170 therefrom, a private sale January 23, of substantially all the balance for \$307, is a sale of a stock of goods in bulk, and void if no sworn statement of the vendor's creditors is given as required by Laws 1901, p. 222. *Fitz Henry v. Munter*..... 623
9. SAME—DUTY TO DEMAND LIST BEFORE PAYMENT—PURCHASER AS TRUSTEE—DISTRIBUTION OF PURCHASE MONEY. Laws 1901, p. 222, making it the duty of a vendee of a stock of goods in bulk to demand a list of the vendor's creditors before payment of the purchase price, etc., makes the debtor's goods a trust fund, and the vendee a trustee, for all the creditors; and where the list is not given upon demand, and the purchase price is paid into court, the funds are to be distributed *pro rata* to all the creditors who are parties to the suit. *Id.*..... 623
10. CONTRACTS—SALES—FURNISHING ESTIMATES—ESTOPPEL. Upon a contract for the sale of lumber stipulating that the plaintiff should furnish the same upon the estimates of the defendant's engineer, the defendant is estopped to assert that no estimates were obtained from the engineer, where the defendant constantly furnished the estimates, received the lumber and made payments thereon, and where the engineer was exclusively under defendant's control and refused to furnish estimates to the plaintiff, stating that he furnished them to the defendant. *Hopkins v. International Lumber Co.*..... 181

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11. **SAME—EVIDENCE—ADMISSIONS.** In such case the defendant can not complain of a judgment for the contract price for the amount admitted to have been furnished under the contract, and estimated. *Id.*..... 181

SOCIETIES:

- Membership, expulsion, notice to insane member. See **BENEFICIAL ASSOCIATIONS**, 3-6.

SPECIFIC PERFORMANCE:

- Of compromise. See **COMPROMISE**, 1.
- Of oral agreement to purchase from husband. See **COMMUNICIPAL PROPERTY**.

STALE DEMAND:

- See **INSURANCE**, 1.

STATE:

- City as instrumentality of. See **MUNICIPAL CORPORATIONS**, 10, 11.
- Grant by to United States, deed, existing leases. See **PUBLIC LANDS**, 6-11.

STATEMENT OF FACTS:

- See **APPEAL AND ERROR**.

STATUTE OF FRAUDS:

- See **FRAUDS**, **STATUTE OF**.

STATUTES:

- Repeal of. See **TAXATION**, 4; **JUDGMENTS**, 7.
1. **STATUTES—CONSTRUCTION—AMENDMENTS—LEGISLATIVE INTENT—AMBIGUITY—WHEN SHOWN.** Where an amendatory act (Laws 1903, p. 279) for the consolidation of cities provides that the special election of officers for the new city shall be held "six months after" the filing of the abstract of the vote for consolidation, and that it be called immediately, requiring a six months' notice, and the former act provided that it shall be held "within six months;" and another section of both the old and new acts provides that all special elections shall be held in accordance with the general election law, requiring a fifteen days' notice, such an ambiguity exists that an examination into the legislative intent is necessary,

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- especially since the requirement that it be held six months after the date of filing may bring the election on Sunday, and since it is usual to allow latitude to avoid confusion. (Fullerton, C. J., and Mount, J., dissent.) *Scouten v. Whatcom*..... 273
2. SAME—ENROLLED BILL—WHEN NOT CONCLUSIVE. Where a doubt exists as to the legislative intent in the wording of an ambiguous statute, reference may be made to the history of the bill before the legislature, beyond the enrolled bill, to ascertain the intent. *Id.* 273
3. SAME—MUNICIPAL ELECTIONS—TIME OF HOLDING. Where the original bill (Laws 1903, p. 279) as introduced provided that an election should be held "within six months" after a certain date, and such clause remained in the bill through all its stages up to and including its final passage, when in the enrolled bill for the first time it appears as "six months after" said date, such change is manifestly a clerical error of the enrolling clerk, and in connection with an inconsistent section requiring a fifteen days' notice, the enrolled bill requiring six months' notice does not express the legislative intent, and must be construed to permit the election "within" six months upon fifteen days' notice, especially as the act was only amendatory upon a distinct point, no other change being made. (Fullerton, C. J., and Mount, J., dissent.) *Id.* 273

STREETS:

- Acquisition by prescription. See ADVERSE POSSESSION, 3, 4.
- Bicycles, regulation of. See MUNICIPAL CORPORATIONS, 12.
- Building permit, death of pedestrian. See NEGLIGENCE, 1.
- Dedication of. See DEDICATION, 1.
- Improvement of, contract for. See MUNICIPAL CORPORATIONS, 13-15.
- Negligence of city. See MUNICIPAL CORPORATIONS, 16-23.
- Private way to depot. See ADVERSE POSSESSION, 3.

SUBSCRIPTION:

1. SUBSCRIPTION—CONTRACT FOR RAILWAY SUBSIDY—CONSTRUCTION—INDEFINITENESS—COMPLAINT—SUFFICIENCY. A complaint to recover a subscription to aid in the construction of a railway does not state sufficient facts to constitute a cause of action when the same is based upon correspondence set out in the complaint from which it appears that there was no part performance, the line having been already located to run near the defendant's land, pursuant to an undisclosed oral conversation, and no binding agreement had been made, and plaintiff left it to defendant to do

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whatever he thought proper, while the defendant wrote he would be willing to aid to the extent that others did, and would decide later if he could pay cash or give land, explaining that the land was under mortgage and he could not give title; such contract being too indefinite and uncertain to sustain an action. *Abbott v. Kline*..... 686

SUMMONS:

See PROCESS, 1.

TAXATION:

— Foreclosure of lien, summons, vacation of default. See PROCESS, 1; JUDGMENTS, 9.

— Payment, prerequisite to platting addition to city. See MUNICIPAL CORPORATIONS, 7.

1. TAXATION—ASSESSMENT LIST—OMISSION OF OWNER'S NAME—NOTICE. The assessment of real property to the wrong person and the omission of the name of the owner does not invalidate a tax under the revenue laws of 1890, 1893, 1895 and 1897, providing that realty shall be listed "with the name of the owner if known, and if unknown, so stated," where it does not appear that the true owner was known to the taxing officers, since such provision is directory only and not essential to the proceeding *in rem* by which the tax is enforced. *Woodward v. Taylor*..... 1
2. SAME—PROCEEDINGS *in rem*. There was no substantial change in the method of assessment and collection provided by the revenue laws of said years, which was by a proceeding *in rem*, in which the assessment itself is due notice to the owner of the realty of the tax charged. *Id.*..... 1
3. TAX SALE—REDEMPTION—NOTICE TO OWNER—SUFFICIENCY. Notice to a nonresident owner of the expiration of the period of redemption and application for a tax deed, by service upon a resident agent, and upon the tenants in possession, and by publication, is all that is required by Laws 1893, p. 380, § 127, although the assessment was made to the wrong person. *Id.*..... 1
4. TAXATION—STATUTES—REPEAL. The revenue law of 1891 did not supersede the law of 1890 so as to render the latter inoperative before any assessment could be made thereunder, when proceedings were begun under the act of 1890 before the law of 1891 went into effect, since the repealing clause repressly excepted from its operation all pending proceedings and existing rights. *Id.* 1

TELEPHONE:

— Contracts by. See CONTRACTS, 3.

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- Of surrender of mortgage upon rescission. See CANCELLATION OF INSTRUMENTS, 1.
- Paying costs out of. See COSTS, 1.

TIDE LANDS:

See PUBLIC LANDS.

TIME:

- Computation of, for return of summons. See FORCIBLE ENTRY AND DETAINER.
- Computation for filing notice. See MECHANICS' LIENS, 8.

TRADE-MARKS:

1. **TRADE-MARKS—REGISTRATION—INFRINGEMENT—COMPLAINT.** A complaint for the infringement of a trade-mark which fails to allege that it was registered in accordance with Bal. Code, § 3621, must state a case for equitable relief at common law. *Woodcock v. Guy*..... 234
2. **SAME—FRAUD NECESSARY AT COMMON LAW.** At common law a demurrer to a complaint to enjoin the infringement of plaintiff's trade-mark "Gargline" for a throat medicine, by defendant's use of "Gargeline" for the same purposes, is properly sustained where there is no allegation of fraudulent conduct, or that the same was printed in a particular manner calculated to mislead the public, or that the public was deceived, or that the plaintiff sustained any damage. *Id.*..... 234
3. **SAME—NOTICE TO DISCONTINUE USE—INJUNCTION.** Nor would such a complaint be sufficient to authorize an injunction without alleging the facts respecting service upon the defendant of notice to discontinue such infringement, and an allegation that such a letter was written to defendant without proof that it was received is insufficient. *Id.*..... 234

TRANSCRIPT:

- Of judgment. See EXECUTION, 2.
- On appeal. See APPEAL AND ERROR.

TRIAL:

- Advisory verdict, harmless error. See APPEAL AND ERROR, 36.
- Amendments allowed. See PLEADINGS, 7.
- Appearance, what is. See APPEARANCE, 1.
- Attorney, excluding. See ATTORNEY AND CLIENT, 1.

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- By jury, waiver. See JURY, 1, 2.
- Challenge to jurors. See JURY, 3.
- Comment on evidence. See CRIMINAL LAW, 32, 33, 37, 40.
- Equitable defense, without jury. See EJECTMENT, 4.
- Failure of proof. See BRIDGES, 1.
- Judgment, assent to form. See JUDGMENT, 1.
- Judgment on motion of court, when premature. See JUDGMENT, 2.
- Law of case. See APPEAL AND ERROR, 45.
- Motion for acquittal. See CRIMINAL LAW, 31.
- Motion for change of venue, hearing. See VENUE, 2.
- Objections, when to be made. See APPEAL AND ERROR, 36; CANCELLATION OF INSTRUMENTS, 1.
- Presence of accused. See CRIMINAL LAW, 27.
- Questions for jury. See BENEFICIAL ASSOCIATIONS, 1, 2; CONTRACTS, 1; CRIMINAL LAW, 18, 30, 31; MASTER AND SERVANT, 3, 4; MUNICIPAL CORPORATIONS, 20.
- Questions for court. See BENEFICIAL ASSOCIATIONS, 3; MASTER AND SERVANT, 8.
- Theory of trial. See APPEAL AND ERROR, 32.
- Variance. See APPEAL AND ERROR, 45; FRAUD, 2.
- Verdict, whether excessive. See CONVERSION, 2; DAMAGES, 1.
- Waiver of motion. See APPEAL AND ERROR, 35.
- Written instructions. See APPEAL AND ERROR, 28.
- 1. TRIAL—ORDER OF PROOF—APPEAL—HARMLESS ERROR. The refusal of the court to permit a witness to answer certain questions is not reversible error in a cause tried without a jury, where the witness was afterwards permitted to fully answer the same. *Russell v. Gay*..... 83
- 2. TRIAL—INSTRUCTIONS. An instruction in part correct is properly refused where the assumption made therein that the plaintiff was running at the time of the accident is not warranted by the evidence. *Smith v. Seattle*..... 481
- 3. SAME. It is not error to refuse instructions covered by the general charge. *Id.*..... 481
- 4. CONTINUANCE. The discretion of the trial court in refusing a continuance on account of the absence of witnesses not interfered with. *State v. Champous*..... 339
- 5. CRIMINAL LAW—TRIAL—TAKING EXHIBITS TO THE JURY ROOM. Under Bal. Code, § 5004, the records in an inquiry as to the accused's sanity, which has been received in evidence, may be taken to the jury room upon the jury's retiring for deliberation. *Id.* 339

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6. **TRIAL—DIRECTED VERDICT.** When the evidence authorized judgment for the plaintiff, and defendant offers no evidence, there is no disputed evidence on material points, and it is proper to direct a verdict for the plaintiff. *Pacific Nat. Bank v. Actna Indemnity Co.* 458
7. **NEGLECT—DAMAGES—PHYSICIAN'S SERVICES—FAILURE TO PROVE AMOUNT PAID—INSTRUCTIONS.** In an action for personal injuries where no specific sum is claimed as damages on account of the employment of certain physicians, who treated plaintiff for serious injuries, and no evidence was introduced as to the value of such services extending over a considerable period, an instruction that the jury are not to consider any damages of this character, "unless there is evidence in the case . . . that such damages were sustained . . . and had a reasonable value," is not erroneous as assuming that there was any such evidence, or as an instruction upon evidence not in the case. *Eggleston v. Seattle* 671
8. **SAME—INSTRUCTIONS—WHETHER ANY EVIDENCE IN SUPPORT OF AN ISSUE—SUBMISSION TO JURY.** Where there is no evidence tending to prove an issue, the court may properly so instruct the jury, but it is not error to fail to do so, where no request therefor is made. *Id.* 671

TRUSTS:

- Purchaser of stock of goods in bulk, trustee for creditors. See SALES, 89.

VACATION:

- Vacation of judgment. See JUDGMENTS, 9, 10.
- Of judgment, review of. See APPEAL AND ERROR, 25.

VARIANCE:

- See PLEADINGS; APPEAL AND ERROR, 45; FRAUD, 1, 2.

VENDOR AND PURCHASER:

- Caveat emptor. See EJECTMENT, 3, 5; EXECUTORS AND ADMINISTRATORS, 10.
 - Purchase from husband. See COMMUNITY PROPERTY, 2.
1. **MORTGAGES—NECESSITY OF DEED—OPTION—CONDITIONAL SALE—ABSOLUTE DEED—WHEN NOT A MORTGAGE.** A contract providing that the defendants should take title to and possession of plaintiffs' realty, upon discharging a mortgage and other liens thereon, and that plaintiffs should have the right to repurchase within two

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years upon repayment of the sums paid with interest and taxes, is not a mortgage, but is a mere option or conditional sale, which is forfeited after expiration of the time, where the contract expressly so provides, and there was no gross inadequacy of price, and no obligation on the part of plaintiffs to repay said sums, as there was no debt capable of enforcement and no mutuality of right to foreclose and redeem. *Reed v. Parker*..... 107

2. SAME—INADEQUACY OF PRICE. In such a case where the premises were worth \$2,500, and the amount paid was over \$1,700, with interest and taxes for two years, there was no gross inadequacy of price. *Id.*..... 107

VENUE:

— Judicial notice of. See **CRIMINAL LAW**, 13.

1. VENUE—CHANGE ON ACCOUNT OF PUBLIC SENTIMENT—SUFFICIENCY OF SHOWING. A motion for a change of venue because of the inflamed condition of the public mind, on account of many sensational crimes in a certain county, is properly denied when the general showing, if effective, would preclude the trial of all criminal cases in such county, and exhibited only the feeling ordinarily prevalent in a community where a heinous crime has been committed. *State v. Champoux*..... 339
2. VENUE—MOTION FOR CHANGE—HEARING—ORAL TESTIMONY—DISCRETION. Upon a motion for a change of venue it is discretionary with the trial court to call witnesses to testify, and it can not be said that refusal to do so is an abuse of discretion. *Id.*..... 339

VERDICT:

See **TRIAL**.

WAIVER:

- Of jury trial. See **JURY**, 1.
- Of motion. See **APPEAL AND ERROR**, 35.
- Of prior right to administration. See **EXECUTORS AND ADMINISTRATORS**, 6.
- Of statutory notice. See **INSURANCE**, 1.

WAREHOUSEMAN:

- Storage by, evidence of. See **CONTRACTS**, 3.

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- As to soundness of logs, latent defects. See **SALES**, 3.

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- Waterway, condemnation. See **EMINENT DOMAIN**, 1-6.
- Water company, construction of articles. See **CORPORATIONS**, 2.

1. **BOUNDARIES—GOVERNMENT MEANDER—LAKE SHORE—TITLE OF UPLAND OWNER.** Land lying between the government meander line of a navigable lake and the line of ordinary high water is the property of the upland owner, the meander being only for the purpose of ascertaining the area. *Johnson v. Brown*..... 588
2. **ADJOINING LAND OWNERS—SURFACE WATERS—DRAINAGE—DAMAGES FROM FLOW—PLEADING—COUNTERCLAIM FOR REMOVING LATERAL SUPPORT—SUFFICIENCY.** In an action between adjoining land owners brought to enjoin the flow of surface waters and drainage collected on the defendant's premises, a counterclaim alleging that plaintiff had removed the defendant's lateral support, causing a slide and damage to buildings, and destroyed the natural surface of the ground, causing damage in the sum of \$1,000, is not demurrable for failure to state a ground for recovery, and the same is connected with the subject-matter of the action stated in the complaint, and is proper matter for counterclaim under Bal. Code, §§ 4913, 4913a. *Peters v. Lewis*..... 617

WAY OF NECESSITY:

- See **EMINENT DOMAIN**, 6.

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- Order construing, when final. See **JUDGMENTS**, 10.

WITNESSES:

- In rebuttal, endorsement of names on information. See **CRIMINAL LAW**, 25.
1. **MANDAMUS—WITNESSES—COMPELLING ATTENDANCE OF NON-RESIDENT.** A judge of the superior court has no jurisdiction to compel by attachment the attendance of a nonresident witness, who is outside of the jurisdiction, for the purpose of taking his deposition, although a subpoena was served upon him while he was temporarily within the county. *State ex rel. Hopkins v. Kennan* 247
 2. **WITNESSES—PRIVILEGED COMMUNICATIONS—PHYSICIAN AND PATIENT.** Testimony of a physician as to the physical condition of a patient treated by him is properly excluded as privileged, where the exclusion extends only to disclosures while the professional relation existed. *Dubcick v. Grand Lodge A. O. U. W.*.... 651

WITNESSES—CONTINUED.

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3. SAME—WITNESSES—CREDIBILITY—PHYSICIANS APPOINTED BY THE COURT. It is not error to refuse to instruct that the jury may take into consideration in determining the credibility and interest of witnesses that they were physicians appointed by the court to make a physical examination, and were not witnesses on behalf of either party, since that would say inferentially that the jury were at liberty to give greater credence to their testimony because they were selected by the court. *Smith v. Seattle*..... 481
4. CRIMINAL LAW—WITNESSES—CREDIBILITY—FORMER CONVICTION OF FELONY. It is proper to ask a witness upon cross-examination whether he has ever been convicted of a felony, Bal. Code, § 5992, providing that such conviction may be shown to affect his credibility. *State v. Champoux*..... 339
5. EVIDENCE—IMPEACHING—STENOGRAPHER'S TESTIMONY AS TO STATEMENTS AT FORMER TRIAL—WEIGHT. Where witnesses have denied making certain statements at a former trial, testimony of the stenographer that they made the statements ascribed to them is competent in rebuttal, and its weight is for the jury. *State v. Fetterly* 599
6. EVIDENCE—IMPEACHING—LAYING FOUNDATION. Where upon an issue as to fraudulent representations as to the value of a mining claim, a witness testified that it was not such as was represented, evidence of his previous statement that it was a good claim is impeaching testimony, and error requiring a reversal, where no foundation therefor had been laid by calling his attention thereto. *Brown v. Gillet*..... 264
7. SAME—RULE APPLIES TO DEPOSITIONS. The rule that a witness may not be impeached by previous contradictory statements, unless the foundation therefor has been laid, applies to a witness whose testimony is taken by deposition. *Id.*..... 264
8. APPEAL—ADMISSION OF IMPEACHING TESTIMONY—PREJUDICIAL ERROR. Error in the introduction of impeaching testimony without proper foundation, upon the point directly in issue, is presumed prejudicial since it cannot affirmatively appear what would otherwise have been the verdict. *Id.*..... 264

WRIT OF REVIEW:

See CERTIORARI.

— Sufficiency of statement of facts in. See APPEAL AND ERROR, 21.

WRITS:

See PROCESS.

— Attestation of. See CERTIORARI.

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